TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~522.~~ ~~270~~ 74

CHARLES McILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES S. COLEMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 28, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 522.

CHARLES McILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, or some of you, between Charles L. Coleman, plaintiff, and Charles McIlrath, receiver of the Southern Minnesota Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

2 (Indorsed:) United States Supreme Court. Chas. McIlrath receiver, plaintiff in error, vs. Charles L. Coleman, deft. in error. Writ of error deposited in my office June 26, 1874. H. E. Mann, clerk U. S. circuit court dist. Minn'a.

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at St. Paul, in the district of Minnesota, this second day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] H. E. MANN, *Clerk.*

3 *Schedule.*

In the circuit court of the United States, district of Minnesota.

CHARLES L. COL'MAN
against
CHARLES MCILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY.

The above-named plaintiff, Charles L. Col'man, for complaint against

the above-named Charles McIlrath, defendant in this action, respectfully states and shows to this court, to wit:

First. That the said plaintiff is a resident and citizen of the State of Wisconsin, and that the said defendant is a resident and citizen of the State of Minnesota.

Second. That the Southern Minnesota Railroad Company was and is a corporation duly created and existing under the laws of the State of Minnesota, to wit, "A bill for an act to incorporate the Root River Valley and Southern Minnesota R. R. Co.," approved March 2, 1855, as amended by an act entitled "An act to amend an act to incorporate the Root River Valley and the So. Minn. R. R. Co.," approved March
4 1st, 1856, and "An act entitled a bill to change the name of the Root River Valley and the Southern Minnesota Railroad Company," approved May 22d, 1857, and "An act entitled an act to facilitate the construction of the Southern Minnesota Railroad and to amend and continue certain acts in relation thereto," approved March 4, 1864, and was one of the companies named in and accepting an act of the legislature of Minnesota, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections in the State of Alabama to aid in the construction of a certain railroad in said State,' and granting certain lands to railroad companies therein named," approved May 22, 1857. And that long prior to the year 1871, the said corporation duly organized and accepted and acted under the said several acts of the legislature, and prior to the year 1871 built and owned and operated a railroad within said
5 State of Minnesota, extending from a point on the Mississippi River opposite LaCrosse, in the State of Wisconsin, westward about 167 miles to Winnebago City, and was engaged in transporting freights and passengers thereon. That since, defendant is, and has been for six months last past, receiver of the said Southern Minnesota Railroad Company, duly appointed by this court, and in possession of said road and its rolling-stock for all that time, and has been and is engaged in operating the said road, and receiving, conveying, and delivering merchandise, lumber, produce, and other freight of various kinds at and between various points and places on the line of said road, including the points hereinafter mentioned, as receiver aforesaid.

Third. That said plaintiff, for more than six months last past, has been and is engaged in the shipping of lumber, and has, on several occasions, made shipments thereof from the station at the eastern terminus of said road, called Grand Crossing, to other stations thereon, and particularly to Winnebago City, the western terminus of said road, a distance of 167 miles, and that said receiver has, on said occa-
6 sions, charged, exacted, and received from the said plaintiff, for the transportation of his lumber, larger rates and amounts than those fixed and specified for the conveyance of such quantities of lumber for such distance as aforesaid, in and by the statute of the State of Minnesota entitled "An act to regulate the carrying of freight and passengers on all railroads in this State," approved March 6, 1871, and particularly that on the 3d day of June, 1873, the said receiver charged, exacted, and received from the said plaintiff as freight or charges for the conveyance on said road, between the stations aforesaid, viz: from Grand Crossing to Winnebago City of one car-load of lumber the sum of $40 for said car-load, and that the lawful rate for the conveyance thereof as fixed by the statute last mentioned for said distance,

over which the same was transported, was only the sum of $25.98 cts.—making an overcharge by said receiver of $14.05 cts., by means whereof and by force of said statute, said plaintiff is entitled to demand and receive from said defendant the sum of one thousand dollars as and for liquidated damages.

Fourth. That, in like manner, the said receiver, on the 6th day of June, 1873, exacted, charged, and received from the said plaintiff
7 as freight or charges for the conveyance on said road between the stations aforesaid, viz: from Grand Crossing to Winnebago City of one other car-load of lumber the sum of $40, and that the lawful rate for the conveyance thereof, as fixed by the statute last mentioned for the distance over which the same was transported was only $25.95 cts., making an overcharge by said receiver therefor of the sum of $14.05 cts., by means whereof and by force of said statute the said plaintiff is entitled to demand and recover from said defendant the further sum of one thousand dollars as and for liquidated damages.

Fifth. That in like manner the said receiver, on the 7th day of June, 1873, charged, exacted, and received from said plaintiff, as freight or charges for the conveyance on said road, between the stations aforesaid, viz: from Grand Crossing to Winnebago City of one other car-load of lumber, the sum of $40, and that the lawful rate for the conveyance thereof for the distance over which the same was transported as fixed by the statute last mentioned was only $25.95 cts., making an overcharge by said receiver therefor of $14.05 cts., by means whereof and by
8 force of the said statute the said plaintiff is entitled to demand and recover from said defendant the further sum of one thousand dollars as and for liquidated damages.

Wherefore the said plaintiff demands judgment against the said defendant in the sum of three thousand dollars besides the costs and disbursements of this action.

HUDDLESTON & PRINGLE,
Attys. for Pltff.

9 (Indorsed:) U. S. circuit court, district of Minnesota. Charles L. Col'man against Charles McIlrath, receiver of the Southern Minn. R. R. Co. Complaint filed July 1, 1873, H. E. Mann, clerk. Huddleston & Pringle, attys. for pl't'ff.

10 In the circuit court of the United States, district of Minnesota.

CHARLES L. COL'MAN
against
CHARLES MCILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD.

The said defendant, for answer to the complaint of said plaintiff in this action, respectfully states and shows to the court, to wit:

First. The said defendant admits that said plaintiff is a resident and citizen of the State of Wisconsin, and that the said defendant is a resident and citizen of the State of Minnesota, and that the Southern Minnesota Railroad Company was and is a corporation duly created and existing under the laws of the State of Minnesota, to wit, the several acts of the legislature in said complaint referred to, and was one of the companies named in and accepting the act of the legislature of Minnesota approved May 22, 1857, in said complaint referred to, and that long prior to the year 1871 the said corporation duly organized

11 and accepted and acted under said several acts of the legislature, and long prior to the year 1871 built and owned and operated a railroad within said State of Minnesota, extending to a point on the Mississippi River opposite La Crosse, in the State of Wisconsin, westward about 167 miles to Winnebago City, and was engaged in transporting freight and passengers thereon, as in said complaint stated; that said defendant is and has been for six months last past receiver of said railroad company, duly appointed, and in possession of said road and its rolling-stock, and engaged in operating the said road and receiving, carrying, and delivering merchandise, lumber, produce, and other freight at and between various points on the line of said road, as in said complaint stated; that said plaintiff has been and is engaged in the shipping of lumber, and has on several occasions made shipments thereof as in said complaint stated, and particularly from the eastern terminus of said road, called Grand Crossing, to the western terminus of said road, called Winnebago City, a distance of 167 miles. Said defendant further admits that on the 3d day of

12 June, 1873, the said receiver exacted, charged, and received from said plaintiff, as freight or charges, for the conveyance on said road between the stations aforesaid, viz: From Grand Crossing to Winnebago City, of one car-load of lumber, the sum of $40 for said car-load, and that the rate for the conveyance thereof prescribed by the act of the legislature of the State of Minnesota approved March 6, 1871, in said complaint referred to, for the said distance over which the same was transported, would be only $25.95 *cts.*; and that in like manner the said receiver, on the 6th of June, 1873, exacted, charged, and received from the said plaintiff, as freight or charges for the conveyance on said road from said Grand Crossing to Winnebago City of one other car-load of lumber the sum of $40 for said car-load, and the rate for the conveyance thereof prescribed by the act of the legislature of the State of Minnesota approved March 6, 1871, in said complaint referred to, for the distance over which the same was transported, was only $25.95 *cts.*; that in like manner, on the 17th day of June, 1873, the said receiver charged, exacted, and received from said plaintiff as freight or charges for the conveyance on said road from

13 Grand Crossing to Winnebago City of one other car-load of lumber, the sum of $40 for said car-load, and the rate for the conveyance thereof prescribed by the act of the legislature of the State of Minnesota approved March 6, 1871, in said complaint referred to, for the distance over which the same was transported was only $25.95 *cts.*

Second. The said defendant, further answering, says that said rates so charged as aforesaid by said defendant were and are the rates fixed and adopted by the board of directors of said company before the appointment of said receiver, and before the passing of said act of March 6, 1871, and that the same were and are just, equal, and reasonable rates; that by the charter of said railroad company, and the several acts, amendment thereto, set up in the complaint, the said Southern Minnesota R. R. Co. and this defendant became and are entitled to fix, adopt, charge, and receive reasonable rates for the transportation of all merchandise and freight carried over said road; and that said charter constitutes, and is, a contract by and between the said State of Minnesota and

14 the said railroad company, which, by its terms, protects said company from any legislation by said State divesting or impairing its vested rights, among which is the right to fix, adopt, charge, and receive such reasonable rates as aforesaid; that the defendant, as re-

ceiver aforesaid, is, and was when said charges were made as aforesaid, a common carrier of goods and merchandise over and upon the said railroad of such company; and prior to the appointment of said receiver the said company had been such common carrier as aforesaid.

Third. That by said act of March 6, 1871, this defendant and said company are not permitted to carry the mineral, agricultural, and other productions or manufactures on equal or reasonable terms; that the rates of tariffs fixed and prescribed by said act are unjust to said company, and are not reasonable rates, but are unreasonably low, and make unequal, unreasonable, and arbitrary discriminations between the different productions and manufactures of said State; and that defendant is advised and insists that said act of March 6, 1871, is in violation of the Constitution of the United States and State of Minnesota, respectively.

15 Wherefore, defendant demands judgment in this action in his favor, with the costs and disbursements.

H. J. HORN,
G. E. COLE,
Attys. of Deft.

(indorsed:) U. S. circuit court, dist. of Minnesota. Charles L. Col'man against Charles McIlrath, receiver of the Southern Minn. R. R. Co. Answer. Filed July 1, 1873. H. E. Mann, clerk. H. J. Horn, G. E. Cole, attys. of deft.

16 U. S. circuit court, district of Minnesota.

CHARLES L. COL'MAN
against
CHARLES MCILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY.

It is hereby stipulated and agreed by and between the parties to this action: 1st. That the rates heretofore charged by the defendant to the plaintiff and paid to him for transportation of freight over the road of said company, are, and were, higher than the maximum rates fixed by the act of March 6, 1871, regulating the rates of carriage for passengers and freight on all the railroads in this State, but that the rates so charged by said receiver were not unreasonable unless made unreasonable by the mere force of said act.

2d. That the tariff of rates fixed by said act makes arbitrary and unjust discrimination between the different products and manufactures of this State.

3d. That the rates so charged by said defendant were and are the same which were fixed and adopted by the said company before the appointment of said receiver, and before the passage of the said act of
17 March 6, 1871.

4th. That the defendant is, and was at the dates of said transactions, a common carrier.

Dated July 1, 1873.

HUDDLESTON & PRINGLE,
Attys. for Plff.
H. J. HORN, G. E. COLE,
Attys. of Deft.

(Indorsed:) U. S. circuit court, dist of Minnesota. Charles L. Col-

man against Charles McIlrath, receiver, &c. Stipulation as to facts. Filed July 1, 1873. H. E. Mann, clerk.

18 In the circuit court of the United States for the district of Minnesota.

CHARLES L. COLEMAN
vs.
CHARLES McILRATH, RECEIVER OF THE SOUTHern Minnesota Railroad Company.

It is hereby stipulated that a jury in the above-entitled action be, and the same is hereby, waived, under the act of Congress in such case made and provided. It is also stipulated that said cause may be placed upon the calendar for trial at the present term of said court without further notice.

July 1, 1873.

HUDDLESTON & PRINGLE,
Attys. for Pltff.
H. J. HERN, G. E. COLE,
Attys. of Deft.

19 (Indorsed:) Circuit court of U. S., district Minnesota. Charles L. Coleman vs. Charles McIlrath, receiver, &c. Waiver of jury trial and stipulation to place cause on calendar. Filed July 1, 1873. H. E. Mann, clerk.

20 United States circuit court, district of Minnesota.

Term minutes. June term, A. D. 1873. *July* 1, 1873.

CHARLES L. COLEMAN
vs.
CHARLES McILRATH, RECEIVER OF THE SOUTHern Minnesota Railroad Company.

Ordered, on motion of the parties to this cause, that it be placed on the calendar for this term.

And the parties appearing, by their attorneys, Messrs. Huddleston & Pringle for the plaintiff, and H. J. Hern and Gordon E. Cole, esquires, for the defendant, and having filed their stipulation in writing waiving a jury trial, the cause was brought to a hearing before the court, and was submitted upon an agreed statement of facts, and by the court held under advisement.

United States circuit court for the district of Minnesota.

Term minutes. June term A. D. 1874. *June* 24, 1874.

CHARLES L. COLEMAN
vs.
CHARLES McILRATH, RECEIVER OF THE SOUTHern Minnesota Railroad Company.

This cause duly came on for trial at a general term of said court,
21 and a jury trial having been waived by the stipulation of the

attorneys of the parties, the said cause was tried by the court upon the pleadings and an agreed statement of facts set forth in the stipulation of the attorneys of the parties, and after hearing the arguments of the counsel of the parties respectively, and duly considering the same, the court finds and determines, as a conclusion of law, that upon the said facts as agreed upon, the said plaintiff is entitled to judgment against the said defendant in the sum claimed by him, the said plaintiff, in his complaint, to wit, three thousand dollars, with his costs and disbursements to be taxed by the clerk of said court; to which said decision, order, and judgment, and every part thereof, the said defendant duly excepted, and his exceptions were duly noted.

June 24, 1874.

R. R. NELSON, *Judge.*

C. L. COLEMAN
vs.
CHARLES MCILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY.

This cause having been tried before the court without a jury,
22 pursuant to the stipulation of the parties on file at the June term thereof, A. D. 1873, and having been submitted to the court and taken under advisement, and the court being fully advised in the premises, it is by the court considered, ordered, and adjudged that the plaintiff do have and recover of and from the defendant the sum of three thousand dollars, besides his costs and charges by him in and about his suit in this behalf expended to be taxed, and that the plaintiff have execution therefor.

Judgment record signed this 24th day of June, A. D. 1874.

H. E. MANN, *Clerk.*

23 In the circuit court of the United States in and for the district of Minnesota.

CHARLES L. COLEMAN
vs.
CHARLES MCILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY.

Be it remembered that at a general term of said court the above-entitled cause was duly called for trial, and the parties appeared, by their attorneys and counsel, respectively, and having duly waived a jury trial by their written stipulation on file, the said cause was thereupon tried by the court upon the pleadings and an agreed statement of facts set forth in the stipulation of the parties in writing, by their attorneys, on file and annexed to the decision of the court hereinafter referred to, and a copy whereof is hereto also attached and made part hereof; that thereupon said cause was duly tried by the said court upon the pleadings and said agreed statement of facts, and afterwards the said cause was decided by the said court on the twenty-fourth day of June, 1874, and the decision of said court was on that day filed in writing, as will appear by the same; to which said decision, order, and judgment the said defendant duly excepted, and his exception was duly noted, a copy of which decision is hereto annexed and made part hereof; and that the said matter may duly appear of record, the same is hereby
24 allowed as a bill of exceptions.

Dated June 24, 1874.

Witness my seal.

R. R. NELSON, *Judge.* [SEAL.]

25 U. S. circuit court, district of Minnesota.

CHARLES L. COLEMAN
vs.
CHARLES McILRATH, RECEIVER OF THE SOUTHERN Minnesota Railroad Company. } Stipulation of facts.

It is hereby stipulated and agreed by and between the parties to this action—

1st. That the rates heretofore charged by the defendant to the plaintiff, and paid to him, for transportation of freight over the said road of said company are and were higher than the maximum rates fixed by the act of March 6th, 1871, regulating the rates of carriage for passengers and freight on all the railroads in the State, but that the rates so charged by said receiver were not unreasonable, but were just, equal, and reasonable, unless made unreasonable by the mere force of said act.

2nd. That the tariff of rates fixed by said act makes arbitrary and unjust discrimination between the different products and manufactures of this State.

3d. That the rates so charged by said defendant were and are the same which were fixed and adopted by the said company before the appointment of said receiver and before the passage of said act of March 6, 1871.

4. That the defendant is, and was at the dates of said transactions, a common carrier.

Dated July 1, 1873.

HUDDLESTON & PRINGLE,
26 *Attys. for Plffs.*

H. J. HORN,
G. E. COLE,
Attys. for Plffs.

In the circuit court of the United States for the district of Minnesota.

CHARLES S. COLEMAN
vs.
CHARLES McILRATH, RECEIVER OF THE SOUTHERN Minnesota Railroad Company.

This cause duly came on for trial at a general term of said court, and a jury trial having been duly waived by the stipulation of the attorneys of the parties, the said cause was tried by the court upon the pleadings and an agreed statement of facts set forth in the stipulation of the attorneys of the parties hereto annexed, and after hearing the arguments of the counsel of the parties respectively, and duly considering the same, the court finds and determines as a conclusion of law that upon the said facts as agreed upon the said plaintiff is entitled to judgment against the said defendant in the sum claimed by him, the said plaintiff, in his complaint, to wit, three thousand dollars, with his costs and disbursements.

Let judgment be entered in favor of said plaintiff against said defendant, with his costs and disbursements, to be taxed by the
27 clerk of said court. To which said decision, order, and judgment, and every part thereof, the said defendant duly excepted, and his exception was duly noted.

June 24, 1874.

R. R. NELSON, *Judge.*

(Indorsed:) United States circuit court, district of Minnesota. Charles L. Coleman vs. Charles McIlrath, receiver, &c. Bill of exceptions. Filed June 24, 1874. H. E. Mann, clerk.

28 In the circuit court of the United States in and for the district of Minnesota.

CHARLES L. COLEMAN
vs.
CHARLES McILRATH, RECEIVER OF THE Southern Minnesota Railroad Company.

At the request of Samuel B. Ruggles and Albon P. Man, trustee of the Southern Minnesota Railroad Company, and upon motion of H. J. Horn, attorney for said defendant in this matter, leave is granted to said defendant, as receiver aforesaid, to sue out a writ of error in the above-entitled action, and he is thereupon directed to give the required bond for a supersedeas.

June 26, 1874.

R. R. NELSON, *Judge.*

29 Know all men by these presents, that we, Charles McIlrath, receiver of the Southern Minnesota Railroad Company, E. F. Drake, and H. H. Sibley, all of the county of Ramsey and State of Minnesota, are held and firmly bound unto Charles L. Coleman in the sum of six thousand dollars, to be paid to the said Charles L. Coleman, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 26th day of June, A. D. 1874.

Whereas the above-named Charles McIlrath, receiver of the Southern Minnesota Railroad Company, of Saint Paul, county of Ramsey and State of Minnesota, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the district of Minnesota, on the 24th day of June, A. D. 1874, in a suit therein pending, wherein the said Charles L. Coleman is plaintiff and the said Charles McIlrath, receiver of the Southern Minnesota Railroad Company, is defendant, against said defendant for the sum of $3,000.00 and costs:

Now, therefore, this condition of this obligation, is such that if the above-named Charles McIlrath, receiver of the Southern Minnesota Railroad Company, shall prosecute his said writ of error to effect, and
30 answer all damages & costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES McILRATH, [SEAL.]
Receiver, &c.
E. F. DRAKE. [SEAL.]
H. H. SIBLEY. [SEAL.]

Sealed and delivered in presence of—
H. E. MANN.

STATE & DISTRICT OF MINNESOTA,
County of Ramsey, ss:

Be it known that on this 26th day of June, A. D. 1874, before me personally came E. F. Drake and H. H. Sibley, who, being severally du'y

sworn, each for himself, doth say that he is one of the sureties named in the above obligation; that he is a resident of and a freeholder in the State of Minnesota, and that he is worth the sum of six thousand dollars over and above his debts and liabilities, and exclusive of his property which is exempt from execution.

E. F. DRAKE.
H. H. SIBLEY.

Subscribed and sworn to before me this 26th day of June, A. D. 1874.

[SEAL OF COURT.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

31 (Indorsed:) U. S. circuit court, district of Minnesota. Charles L. Coleman vs. Charles McIlrath, receiver of the Southern Minnesota Railroad Company. Bond on writ of error.

I hereby approve the within bond and the sureties thereon.
June 26, 1874.

R. R. NELSON, *Judge.*

Filed June 26, 1874.

H. E. MANN, *Clerk.*

32 United States circuit court, district of Minnesota, *ss:*

CHARLES L. COLEMAN
vs.
CHARLES MCILRATH, RECEIVER OF THE Southern Minnesota Railroad Company.

And now, upon filing the bond approved by me in this cause, upon application of the defendant, a writ of error to remove said cause to the Supreme Court of the United States is hereby allowed.
June 26, 1874.

R. R. NELSON, *Judge.*

33 UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, Horatio E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, in the eighth circuit, do hereby certify that the foregoing pages, numbered from one to thirty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles L. Coleman vs. Charles McIlrath, receiver of the Southern Minnesota Railroad Company, as the same remain of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this second day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] HORATIO E. MANN, *Clerk.*

(Indorsement on cover:) No. 522. Charles McIlrath, receiver of the Southern Minnesota Railroad Company, plaintiff in error, vs. Charles S. Coleman. Minnesota C. C. U. S. Filed 28th September, 1874.

SUPREME COURT

OF THE

UNITED STATES.

CHARLES McILRATH, Receiver of the Southern Minnesota Railroad Co., Plaintiff in Error,

versus

CHARLES L. COLEMAN, Defendant in Error.

Abstract of Case, and Argument.

GORDON E. COLE,
H. J. HORN,
Att'ys for Plff. in Error.

Faribault Republican Print.

SUPREME COURT

OF THE

UNITED STATES.

CHARLES McILRATH, RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY, PLAINTIFF IN ERROR.

versus

CHARLES L. COLEMAN, DEFENDANT IN ERROR.

Abstract of Case.

The defendant is a common carrier, operating a railroad by virtue of a special charter, and had fixed by its Board of Directors a tariff of rates for transportation, which were just, equal and reasonable, unless made unreasonable by the act of the Legislature of 1871—hereinafter set out—that prescribes rates or tariffs lower than those of the company; and makes arbitrary and unjust discriminations between the different products and manufactures of

the State of Minnesota; the plaintiff in error has disregarded said act of the Legislature, and adhered to the rates fixed by the Board of Directors of said company, and thereby incurred the penalty prescribed by the statute of 1871, if that statute can be sustained as a valid and constitutional law.

And the questions presented by the record and argued and decided adversely to the plaintiff in error in the court below, are:

1st—Is the act of 1871 void because it impairs a contract with the Southern Minnesota Railroad Company, and so within the inhibition of Sec. 10, Art. 1 of the Constitution of the United States?

2d—Or because it deprives the plaintiff in error of his property without due process of law within the provision of Section 7 of Article one of the Constitution of the State of Minnesota, or of the 14th amendment of the Constitution of the United States?

3d—Is it void because in violation of section No. four (4) of article 10 of the Constitution of the State, which is as follows:

Sec. 4.—"Lands may be taken for public way for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land, and the damages arising from the taking of the same, *but all corporations being common carriers, enjoying the right of way in pursuance of the provisions of this section, shall be bound*

to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms."

And the scope and object of the stipulation contained in the record is to present this precise question for decision:

"Whether, when the rates of a common carrier by railroad in conducting its business under a charter from the State, are equal and reasonable, it is competent for the legislature to prescribe lower rates and those which are neither equal nor reasonable; or, in other words, whether the equality or reasonable character of the charges is a question to be conclusively determined by the Legislature or by the judicial tribunals of the country.

That the stipulation is in strict accordance with the facts and does no injustice to the legislation of the State will be seen by reference to the remarks of Judge Dillon:

In re McIlrath, 2 *Dillon*, 460.

The Supreme Court of the State has sustained the validity of the statute of 1871, but has not passed upon the questions raised by this record; the stipulation in that case was as follows:

"That the amount tendered by the plaintiff was in accordance with the rates established by the act; that the amount of one dollar claimed by defendant was its usual rate for transporting like goods, and was in accordance with the published tariff bills, and that, if the act were valid and applicable to the defendant, judgment should be for plaintiff.

Blake vs. Winona & St. Peter R. R. 19 *Minn.*, 418.

State vs. same, decided upon demurrer to complaint, id. 434.

The following is the act of 1871:

An Act to regulate the carrying of freight and passengers on all railroads in this State. Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. It shall be lawful for any railroad company or corporation doing business in this State from and after the date when this act shall take effect as hereinafter provided, to demand and receive from any person, corporation, company or association desiring the transportation of freight by any such railroad company or corporation over its line or lines of railroad, payment for such transportation at and after the rates following, viz:

First. On all kinds of grain, potatoes, flour, meal, beef, pork and meats of all kinds at the rate of six cents per ton per mile, for the first twenty miles or less, that the same may be transported over such line or lines of railroad, and at the rate of five cents per ton per mile, for any distance exceeding twenty and not more than fifty miles, and at the rate of four cents per ton per mile for any distance exceeding fifty and not more than one hundred miles, and at the rate of three and one-half cents per mile for any distance exceeding one hundred miles that the same may be transported; *Provided*, that if the amount of freight desired to be transported at one time shall be less than one car load, such company or corporation may demand and receive an increased compensation therefor at the rate of

twenty per cent. above the prices hereinbefore established.

Second. Upon sawed timber, lumber, laths, shingles, coal and salt, at and after the rates following, viz: at the rate of ten dollars per car load for any distance not exceeding twenty miles, and in addition thereto the following rates, to wit: at the rate of eighteen cents per car load per mile to any distance beyond twenty miles and not exceeding fifty miles; and at the rate of thirteen cents per car load per mile for any distance beyond fifty miles and not exceeding one hundred miles, and at the rate of eleven cents per car load per mile for any distance beyond one hundred miles; *Provided*, that if the amount of material herein mentioned desired to be transported at any one time is less than one car load, then such railroad company or corporation may demand and receive compensation in addition to the price above specified not exceeding twenty per cent. above the prices so specified. For the purpose of this section and the section preceding, a car load shall be taken to be twenty thousand pounds weight.

Third. Upon dry goods and other articles of merchandise usually carried by railroads at rates denominated first class, at rates twenty-five cents in advance of those specified in the first sub-division of this section.

Fourth. Upon sugar in barrels and other articles of merchandise, usually carried by railroads at rates denominated fourth class, at the same rates specified in the first subdivision of this section.

Fifth. Upon wood at the rate of nine dollars per car

load for any distance not exceeding thirty-five miles, and at the rate of eighteen cents per car load per mile for any distance beyond thirty-five miles and not exceeding sixty miles, and at the rate of thirteen cents per car load per mile for any distance beyond sixty miles, provided a car load shall not be less than six cords.

SECTION 2. It shall be lawful for any railroad company or corporation in this State from and after the date when this act shall take effect as hereinafter provided, to demand and receive payment for carrying passengers on any railroad in this State at and after the rate of five cents per mile for each person for the distance such person shall be actually transported by such railroad.

SECTION 3. No railroad company or corporation shall charge any compensation for handling, transferring, or storing any freights transported or to be transported over the line of its railroad, except that upon all freights stored for a longer period than two days after notice given to the consignee to remove the same, such company or corporation may demand and receive for storage exceeding that time such compensation as the same may reasonably be worth. But railroad companies and corporations that shall provide cars at convenient places for loading such freights, may require the consignors to load on the cars timber, lumber, lath, shingles and wood which shall be delivered for transportation.

SECTION 4. It shall be the duty of all railroad companies and corporations in this State to receive all freights of the

kinds mentioned in this act, at any depot or station of such company or corporation whenever brought to such depot for transportation, and to provide suitable places for the storage and reception of such freight at all of its depots and stations. And all railroad companies and corporations shall furnish equal facilities for transporting and shall transport freights of every description in this State to and from warehouses or elevators other than those owned by any such company or corporation at the same rates as from warehouses or elevators owned by such company or corporation, and shall make no discrimination in favor of nor against any warehouse nor elevator.

SECTION 5. Payment for transportation of passengers may be demanded in advance, and payment for freight may be demanded at the place of delivery of such freight after transportation and before delivery.

SECTION 6. That in all cases where freights are offered for transportation over any line of railroads in this State to be carried to and delivered at any point not on the line of said railroad, but upon the line of any other railroad, with which there is a connection by railroad, the said railroad company or corporation where such freight shall be offered for transportation, shall receive and transport the same over its line of railroad to its point of junction with some other connecting line of railroad in the direction in which said freight is desired to be transported by the party offering the same, and any railroad company or corporation with whose line of railroad such junction is made, shall receive such

freights and transport the same to the point of delivery, if on its line of railroad, or if not on its line of railroad, then to such point on its line of railroad as the owner or consignee of such freight may direct. And in all cases where freight shall be so offered for transportation, and in order to reach the point to which the owner or consignee may direct the same to be transported for delivery, it shall be necessary to transport the same over two or more lines of railroad the provisions of this act shall apply to each railroad or corporation over whose line of railroad such freight may be transported to its place of delivery, and shall be transported by each and all of such railroads at and after the rates hereinbefore specified; *Provided*, that in ascertaining the amount of charges to be paid for such transportation, the distance such freight may have been transported over all such railroads shall be charged for only at the rates the same would have been charged for under the provisions of this act had the same been transported the whole of the distance over one only of such lines of railroad. *Provided*, further, that unless the railroad companies or corporations over whose lines of railroad any freight shall be so transported shall agree upon some other manner of dividing the amount of charges collected for such transportation, the same shall be divided between them in manner the following: The whole amount of such charges shall be divided by the whole number of miles such freight shall have been transported by such companies or corporations, and each of such companies or corporations shall be entitled to its

proportion of such charges according to the number of miles such freight shall have been transported over each of such lines of railroad.

SECTION 7. That all railroad companies or corporations doing business in this State, shall transport all freights offered for transportation, within a reasonable time, and in the order of the reception of the same for carriage. And if any railroad company or corporation shall transport freights of any description for any person or persons, corporation, company or association, at rates less than are provided in this act, then such company or corporation shall thereafter transport freights of the same description over its line of railroad for all other persons at the same reduced rates during the time such discrimination is in force.

SECTION 8. That all lines of railroad in this State are hereby declared to be public highways, and all persons shall have and enjoy the right of passage over the same in the passenger cars running and to be run thereon, and the right to have freight of all kinds transported upon and over any and all of such railroads in the cars running and to be run thereon, at rates of charges not exceeding those specified in this act. And each and all railroad companies doing business in this State are hereby required to transport all passengers and freights in the manner and at rates not exceeding those specified in this act; and if any railroad company or corporation shall fail so to do or shall violate any of the provisions of this act, such company or corporation shall pay to the party aggrieved by such failure

the sum of one thousand dollars as settled and liquidated damages, to be recovered by the party injured, in a civil action, and the costs and disbursements of such action.

SECTION 9. The rates established by this act for the transportation of freight and passengers are hereby declared to be the maximum of reasonable rates. If any railroad company or corporation shall demand or receive higher rates for such transportation than are established by this act, it shall be deemed to have misused its powers and violated the terms on which its charter and franchises were granted, and it is hereby made the duty of the Attorney General of this State, upon receiving satisfactory evidence of such misuse, to cause proceedings to be instituted and prosecuted against such railroad company or corporation, in the proper court, for the forfeiture of the charter and franchises of said railroad company or corporation, or for the the collection of a fine not exceeding one thousand dollars for each violation of the provisions of this act, at the discretion of the court before which the case shall be tried.

SECTION 10. This act shall take effect and be in force on and after the first day of May, A. D. one thousand eight hundred and seventy-one.

Approved March 6, 1871.

The acts conferring its corporate powers upon the Southern Minnesota Railroad Company, or modifying or affecting them, and from which it deduces its chartered rights as a common carrier, and which being laws *in pari materia*, are to be construed together as illustrative of the legislative

meaning and intent, as well as constituting parts of the contract, are:

First. Its original charter, granted by the legislature of the Territory of Minnesota, prior to the adoption, of course, of the State constitution, to-wit: March 2d, 1855. [The constitution was adopted by the people in October, 1857, and the State admitted into the Union May, 1858.] Section one provides that Edmund Thompson etc., (naming the corporators) and all such persons as shall hereafter become stockholders in the company hereby incorporated shall be and are made hereby a body politic and corporate by the name and style of the Root River Valley and Southern Minnesota Railroad Company, and by and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against in law and equity, in any and all courts and places as fully as natural persons, and the said corporation may make and use a common seal and alter and renew the same at pleasure, and by their corporate name and style shall be capable of contracting and being contracted with, and of acquiring by purchase, gift, grant, devise or otherwise, and of holding and conveying all such estate and property, real and personal, as may be necessary or convenient to carry into effect the object and purpose of this act and of said corporation.

SECTION 2. The said corporation is hereby authorized and empowered, and it is hereby declared that the objects and purpose thereof are to survey, locate, construct, main-

tain, use and operate, and at their pleasure to alter the line thereof without changing the eastern terminus, a railroad, (describing the same; being the railroad mentioned in the complaint,) together with all necessary and proper stations, depots, turnouts, engines, cars and other appurtenances and furniture of a railroad, and said company is further authorized and empowered to excavate, construct and complete a steamboat canal from the Mississippi river (to a point designated at the eastern terminus of said road) and to remove all obstructions in Root river, etc., and said company may build, construct and operate boats for the conveyance of passengers and freight to and from the eastern terminus of said railroad.

SECTION 3. The capital stock of the corporation hereby created shall be five millions of dollars, and shall be divided into shares of fifty dollars each, and shall be transferable in such manner as the corporation by its regulations or by-laws shall prescribe, but no share of said stock shall be transferred while there shall be any installment assessed thereon unpaid, and the directors of said corporation may, with the consent of the holders of a majority of the stock thereof, increase the capital stock thereof, to such sum as may be necessary or convenient to carry into effect all the rights and privileges hereby granted thereto, not exceeding twenty millions of dollars.

SECTION 4. The said corporation shall have the right of way upon and may appropriate to its own use and control for the purpose of the said railroad and canal, their appur-

tenances, land not exceeding 200 feet in width throughout their entire length.

SECTION 5. The said corporation may take and hold for the said purposes or any of them, such additional land as may be convenient therefor, but unless such lands taken by said corporation for any of said purposes shall be purchased of or voluntarily given by the owner or owners thereof, full and proper compensation therefor shall be made by the said corporation to the owner or owners thereof, which compensation shall be ascertained in the following manner: [The remainder of this section and sections six and seven relate to the mode of condemning right of way and fixing compensation to land owners.]

SECTION 8 provides for meeting of corporators to accept charter and for opening books for subscription to stock.

SECTION 9 authorizes Board of Directors to make assessments upon stock whenever they deem necessary.

SECTION 10 provides that said corporation shall locate said canal, and at least twenty-five miles of railroad, and commence work within five years, and fully complete and equip at least one track within ten years.

SECTION 11 authorizes the corporation to construct road across highways and large navigable streams, and to contract with connecting roads for crossing, connection or joint use.

SECTION 12 provides that every track shall be laid with the H or T rail, of not less than sixty pounds per yard lineal, and all the engines, cars and other furniture shall be

well made of good materials, and of approved form and kind, equal in quality to those of the best equipped and furnished railroads in the United States.

SECTION 13 provides for indictment and punishment of persons obstructing or destroying or injuring railroad and railroad property, and for payment to the company of thrice the amount of damages occasioned thereby, and in case of death of any person caused by any obstruction or injury to railroad or engines or cars it shall be deemed murder.

SECTION 14. Every conductor, baggage master, or other agent or servant of the said company, and who shall be engaged in *the ticket office*, or on the cars on said railroad, shall wear upon his hat or cap a plain badge which shall indicate his office or station: and no conductor or *collector shall demand or be entitled to receive any fare or toll from any freighter or passenger,* or exercise any control or direction in his station, or be authorized or allowed to interfere with any passenger, baggage or freight, without wearing such badge.

SECTION 15 provides for whistling and ringing bell at crossings.

SECTION 16 This act is hereby declared to be a public act, and may be amended by any subsequent legislature in any manner.

On March 1st, 1856, and before any thing had been done towards the construction of the road, as sufficiently appears by the subsequent legislation, the charter was amended as follows:

SEC. 1. That section 2 of the said act to incorporate the Root River Valley and Southern Minnesota Railroad Company be amended by inserting in the 12th line, after the words, "in the Territory of Minnesota," the following words, to-wit: and also with the privilege of a branch railroad starting from Hokah, and running by the most direct and feasible route to some point in the village of Brownsville, in the county of Houston.

SEC. 2. That section 16 of the act of which this is amendatory be amended to read as follows, to-wit:

SEC. 16. This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner, not destroying or impairing the vested rights of said corporation.

3d. The act of Congress making a grant of lands in aid of certain railroads in Minnesota, approved March 3, 1857, provides—

SEC. 3. That said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States.

SEC. 5. That the United States mail shall be transported over said roads under the direction of the Post-Office Department, at such price as Congress may by law direct, provided that until such price is fixed by law the Postmaster General shall have the power to determine the same.

Statutes at Large, 34th Cong., 1856-7, *p.* 196.

P. 83, *Edgerton's R. R. Laws.*

By act of February 27th, 1857, section two of said original charter, was again amended by changing the line of said road in some comparatively unimportant particulars, its general line, terminus and direction remaining the same, and it was provided that said corporation is hereby authorized and empowered to receive subscriptions to the capital stock of said company in bonds and mortgages on real estate, and also in real estate; and from stocks at such valuation and appraisement as shall be determined by the directors of the company.

On the 22d of May, the territorial legislature passed an act entitled an act to execute the trust created by an act of Congress, entitled an act making a grant of lands in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in the State of Alabama to aid in the construction of a certain railroad in said State, "and granting certain lands to certain railroad companies therein named," the act of Congress being that hereinbefore referred to.

By this act the Root River Valley and Southern Minnesota Railroad Company was authorized and empowered, (section 1,) to survey, locate, construct and complete, and perpetually to have, use and maintain and operate a portion of the lines of road in aid of which lands were granted by said act of Congress, and (section 2) for these purposes shall have, possess, exercise and enjoy the same rights, privileges and immunities with reference to the said route or any route of rail road in this act provided for, or any rail-

road to be built therein, as it now possesses or enjoys, with reference to the roads described in the act of incorporation of said company, and the amendment thereto. Section 3 transfers all the lands, interest, rights, powers and privileges granted to and conferred upon the Territory, in and by virtue of said act of Congress, applicable to the lines of road which it was authorized to build, to said company.

Section 4 requires the whole of said railroad to be completed within ten years, and that the said company shall never set up the defence of usury to any contract whatever.

Section 8 provides *interalias*, "said railroads which shall be constructed by the application of funds derived from the lands therein granted shall be and remain a public highway *for the use of the Government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States, and the United States Mail shall be transported over said railroads under the direction of the Post Office Department, as provided in said act of Congress.*

SEC. 9. The said lands so granted shall be and are exempt from all taxation until the same shall have been sold and conveyed by said company. But so soon as said company shall have constructed, equipped and put in operation fifty miles of railroad for the transportation of freight and passengers, the said company shall pay into the treasury of the said Territory or State of Minnesota, in lieu of all taxes whatsoever upon the property of said company, the sum of *three per cent. per annum on the gross earnings of said road,*

said gross earnings to be ascertained by a statement under the oaths of the president and treasurer, which statement shall be filed on or before the first day of January of each year in the office of the Governor, said payments to be made annually within sixty days after the filing of such statements, and the Governor shall have the right to appoint a commissioner to examine the books and accounts of said company at any time.

SEC. 11. Said company shall be capable in law of taking and holding any lands granted by the United States or of this Territory or future State of Minnesota, to aid in the construction of railroads, and may borrow money, issue bonds, etc.

SEC. 19. Said company shall construct and maintain fence on both sides of its road, and cattle guards and farm crossings.

SEC. 20. The lands authorized to be taken by said company for right of way or depot grounds, shall be deemed to be taken for public use.

On May 22, 1857, the route of said railroad was again slightly changed, and the corporate name of the company changed to that of "The Southern Minnesota Railroad Company."

The original act of incorporation appointed (Sec. 8) the first Wednesday of July, 1855, for a meeting of the corporators to accept the charter, and the act of May 22d, 1857, transferring the lands hereinbefore referred to at length, required the company to accept the same by resolution filed

in the office of the Secretary of the Territory within thirty days after the passage of the act (Sec. 17). It is admitted by the pleadings that these acts and charter were duly *accepted.*

Section 1 of the schedule of the Constitution of the State, ratified by the people in October, 1857, provides, "That no inconvenience may arise by reason of a change from a territorial to a permanent State government, it is declared that all *rights*, actions, prosecutions, judgments, claims and *contracts*, as well of individuals as of bodies corporate, shall continue as if no change had taken place."

On the 15th of April, 1858, an amendment to the Constitution, known as the "loan amendment," was adopted, by which provision was made for the loan of the State credit to the companies participating in the Congressional land grant, of which the Southern Minnesota Railroad Company was one; and as security for the payment of the State bonds loaned to it, it was required to execute a mortgage upon all its lands, property and franchises to the State, and as a further and additional security, and to provide a fund for the payment of the interest on such bonds, it was provided, "each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest, which shall accrue thereon, and for that purpose, and as a security therefor, the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging

the net profits of its road for the payment of said interest.

Pursuant to the laws of the State, the mortgage to secure the issue of the State bonds was foreclosed, the Southern Minnesota Railroad Company having made default in the payment of the interest, and the State became the purchaser of the lands, road, property and franchises of said company.

On the fourth of March, 1864, an act was passed by the Legislature of the State of Minnesota, providing as follows (so far as is material):

That all the rights, benefits, privileges, property, franchises and interests of the Southern Minnesota Railroad Company acquired by the State of Minnesota, and pertaining (among others) to the line of roads and branches described in said act of incorporation of the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, A.D. 1855, and the several acts amendatory thereof, are hereby granted and transferred unto (naming certain persons as corporators) with all the immunities, rights, property, benefits and privileges, which the said Root River and Southern Minnesota Railroad Company might or could have had by reason of the passage of said act.

For the purpose of carrying out the objects of this act, the Southern Minnesota Railway Company and their successors and assigns shall have and be possessed of all the powers, immunities, rights, franchises and privileges contained in and provided for by the said two acts referred to in this section, (viz.: the charter of 1855, as amended, and the Land Grant Act of May 22d, 1857.)

SEC. 2. The persons named as grantors in the first section of this act shall constitute a Board of Directors.

SEC. 4. Said person or persons or corporation may have the privilege of acquiring the right of way over the property owned by individuals in the same way as now specified in the charter of the Root River Valley and Southern Minnesota Railway Company, approved March 2d, 1855.

SEC. 5. The land granted, or intended to be granted, by the provisions of this act to this corporation, and all other property and the stock and capital of said company shall be exempt from all taxation, and in consideration of the grants made to and the privileges and franchises conferred upon the company thereby created, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said road shall be completed and in operation, on or before the first day of March of each year, pay into the treasury of the State one per cent. on the *gross earnings of said railroad*, and during the seven years next ensuing, pay into the treasury of the State, on the first day of March of each and every year, *two per cent. on the gross earnings of said railroad*, and shall from and after the expiration of ten years from the completion of said railroad, on or before the first of March of each and every year, pay into the treasury of the State, *three per cent. of the gross earnings of said railroad*, and the payment of such percentum annually, as aforesaid, shall be in full of all assessments and taxation, and *for the purpose of ascertaining the gross earnings, an accurate ac-*

count of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this State, verified by the treasurer and secretary of said company.

SEC. 8. *That the said Southern Minnesota Railroad Company shall transport by all regular trains, all passengers and freights delivered to the same by every connecting line of railroad, now or hereafter to be constructed, on the same terms and at no greater rate than for the time being shall be charged for the same services to persons living on the line of said railroad, provided that any such connecting line shall be governed by the same rules in transporting passengers and freight on their several lines delivered by the Southern Minnesota Railroad.*

SECTION 11. The Southern Minnesota Railroad Company shall have power to create and issue, in such manner and on such terms as it may deem expedient, special stock on any part of said railroad or branches, and to make such agreements as it may deem proper with the holders of any such special stock *for the appropriation of the net earnings of any portion of the railroad* which it may construct or otherwise acequire, to the payment of dividends on such special stock as may be issued in respect thereto, which application as made by said agreement, shall be effectual to secure to the said and future holders of said stock, the application *of such net earnings as in the said agreement provided against any future act of the company, or any of its general liabilities.*

Section 2 provides that the persons named as grantees in the first section, shall constitute the first board of directors, and that afterwards the board shall consist of not more than fourteen nor less than nine persons, to be elected in accordance with the by-laws of the company.

By Section 7 it was provided that the company should build and construct ten miles of railroad within two years, &c.

By act of February 16th, 1865, a grant of swamp land was made by the Legislature of the State, in aid of this road westerly through Southern Minnesota, to the western boundary of the State, (being the road mentioned in the complaint), and it was provided as follows: As soon as twenty miles of said branch road are located and completed, the company shall have the right to and may select from the swamp lands hereby set apart, &c.

On July 4th, 1866, Congress made a further grant to the State of Minnesota in aid of this road, containing the same provisions in regard to the transportation of United States troops and property free of toll and other charges, and of the United States mail, contained in the act of Congress of March 3d, 1857, hereinbefore quoted at length, together with the further clause as to United States property and troops, "and the same shall at all times be transported *at the cost charge and expense in all respects of the company or corporation, or their successors, or assigns, having or receiving the bennefit of the land grant*, herein made."

By an act approved February 25th, 1867, the Legislature

of the State of Minnesota transferred to and vested said grant in the Southern Minnesota Railroad Company.

Section 2 provides, "all the lands, interests, rights and privileges and powers granted to and conferred upon the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in Houston county, through the counties of Fillmore, Mower, Freeborn and Faribault, to the western boundary of the State, are hereby granted to and vested in the Southern Minnesota Railroad Company, subject to the provisions hereinafter contained, and of the act of Congress aforesaid, *provided that the Legislature shall have the right to fix and regulate from time to time, the rates of freight and passenger tariffs on said railway, or over any branch or division thereof.*

And by section 7, it was provided that the company should within 30 days accept such act by resolution, and file a copy of said resolution in the office of the Secretary of State. *This act was never accepted by the company.* At the same session of the Legislature, about ten days after the approval of the foregoing act, to-wit: By an act approved March 7th, 1867, the foregoing section, 2 was amended by omitting the italicised clause. The act is as follows: An act to amend an act, approved February 25th, 1867, entitled an act to accept a grant and in execution of a trust, made and created in and by an act of Congress, entitled "an act making an additional grant of lands to the State of Minnesota, in alternate sections to aid in the construction of railroads in said State, approved Julty 4th, 1866.

Be it enacted by the Legislature of the State of Minnesota.

SEC. 1. That section two of said act be amended to read as follows:

SEC. 2. All the lands, interests, rights and privileges and powers granted to and conferred upon the State of Minnesota for the purpose of aiding in the construction of a railroad from Houston, in Houston county, through the counties of Fillmore, Mower, Freeborn and Faribault, to the western boundary of the State, are hereby granted to and vested in the Southern Minnesota Railroad Company, subject to the provisions hereinafter contained, and the provisions of the act of Congress aforesaid.

By an act of the Legislature of the State, approved March 4th, 1858, a slight and not material change in the line of the road was made, and it was further provided: The said Southern Minnesota Railroad Company are hereby required to construct and fully complete with the cars running thereon on the line heretofore indicated, consecutively, commencing at the village of Rushford, ten miles, on or before January 1st, 1869, and the further distance of ten miles annually, for the two years next ensuing, and from thence to the western line of the State, within the time prescribed by said act of Congress, of July 4th, 1866.

By act approved March 5th, 1868, the said company were authorized to build a railroad bridge across the Mississippi river at La Crosse.

By act approved February 26th, 1869, it was provided

that the capital stock of the Southern Minnesota Railroad Company should be divided into and represented by shares of one hundred dollars each, instead of fifty dollars, as heretofore provided by law. That each one hundred dollars of said capital stock upon which unpaid installments shall not be due, shall be entitled to one vote in *matters pertaining to the government and affairs of said company, as now authorized by or now or hereafter provided by the by-laws of said corporation.*

SEC. 2. *That the board of directors shall have power to adopt such by-laws as such board may deem necessary for the purpose of properly carrying out the objects and purposes of this act.*

None of the long chain of acts and enactments which together constitute the charter of the Southern Minnesota Railway Company, contain any reservation whatever of any power to amend, alter, or repeal other than what has been set forth *in extenso* in the foregoing summary, and no general law or provision of the constitution, and thus stood the law from which springs the chartered rights of the said company, at the date of the act of 187?, assuming to regulate tariffs.

ARGUMENT.

First.—The sole question to be determined upon the phraseology of this legislation, which together constitute the company's charter and contract with the State, is, what

is the exact nature, limits and extent of the company's rights, granted by its charter? For whatever these are, they are protected by the Federal constitution, and inviolate by any act of State legislation.

The counsel for the appellant in the State court, in which this question has been determined adversely to the views maintained by us, setting out with the imperfect and inaccurate analogy afforded by cases of highways for the mere use of which with and by the means of vehicles supplied by the party using the road, a toll is exacted, seems to have become bewildered by the mazes of his own argument, and to have been drawn by a metaphysical discussion of the distinction between ordinary and extraordinary franchises, which is more curious than practical, far away from the real point and gist of the question under examination. Now while it is true in a general sense that public grants are to be construed most strongly in favor of the public, the rule only applies to cases in which there is room for construction, and where, after a pains-taking examination of the context and laws upon the same subject, there remains a fair and reasonable doubt, side by side with it, exists in full force and vigor a rule of construction of much more general application, that all laws, instruments and contracts are to be construed so as to effect the intention of the parties. "The charter is not to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and construed, and reasonably and justly expounded."

Perrine vs. Chesapeake & Delaware Canal Co., 9 *How.* 172.

The Binghampton Bridge Co. 3 *Wallace*, 51-74.

Home of the Friendless vs. Rouse, 8 *Wallace*, 430-7.

Another rule of construction is just as applicable to public grants as to private ones, viz: That by a grant not only the thing expressly granted passes, but with it everything necessary and incidental to its enjoyment. Indeed, the very court that pronounced the decision in the case of Blake vs. the Winona & St. Peter R. R. Company, has in an earlier case correctly stated the rule in its application to the same charter: "That the charter of a private corporation is a contract there is no doubt, and that in the absence of express limitation or restriction the corporation takes the franchises, with all reasonable and necessary incidents to accomplish the object of its existence."

Winona & St. Peter R. R. Co., vs. Waldron, 11 *Minn.*, 534.

And see explicit concession of Morton J., Charles River Bridge vs. Warren Bridge, 7 *Pick.*, 462.

2*d. Redfield on Railroads*, 446.

Inhabitants of Springfield vs. Connecticut River R. R. Co., 4 *Cushing*, 63.

Enfield Toll Bridge Co. vs. H. & N. R. R. Co., 17 *Connecticut*, 453.

What these objects are is well stated by the Supreme Court of Illinois:

"When these great and useful bodies were created, there

were two considerations that induced their organization. One was—and it was the highest and most important—the accommodation of the public and the promotion of their interest. The other was the promotion of the interest of the individual stockholders in such company."

Peoria & Rock Island R. R. Co. vs. Ch. Coal Valley Mining Co., 5 *Ch. L. News*, 338.

The latter can only be accomplished by the receipt of remunerative rates, charges, tolls, fare, or by whatever term the compensation for carrying freight and passengers may be called. Is not this then a "*reasonable incident* to accomplish the object of its existence?"

But a glance at the charter and laws amendatory thereof, quoted above, will suffice to show, that the right to receive compensation is constantly assumed and recognized. The charter requires no resort to implication, but only a fair and reasonable interpretation of its language. To recur, then, in the light of these rules of interpretation to the question as to what rights attached and vested in the company: the case of a railroad operated by means of motive power and vehicles furnished and owned by the same corporation which builds and owns the road is *sui generis*. Its franchise is not merely to build a highway and exact compensation of those who choose to pass over it with their own conveyances; neither is it the right to exercise the vocation of a common carrier merely, a right common to all and existing at common law; but it is the right to exercise the vocation of a common carrier by means of a railroad, and

the instant this right is conferred, the rights and liabilities of such carriers as long established by the common law become indelibly stamped upon the contract, and woven into its texture, and if the clause of the Constitution of the United States prohibiting the passage of laws by a State impairing the obligation of contracts, is of any value, are as much protected by that instrument as if written in the charter. The right to exercise the vocation of a common carrier by means of its railroad, it must be conceded in the light of all the authorities, constitutes the gist of the grant to build, maintain and operate a railroad. It must also be conceded that it is exactly this which is protected from invasion. Now is this Constitutional provision in its application to State legislation to be construed so as to afford the intended protection, or is it to be frittered away by the feeble efforts of verbal criticism? Is the right protected—that of being a common carrier clothed with his common law rights and responsibilities; or is it the right to be such, stripped of all those essential attributes which in every age have constituted it a distinctive calling? If the latter, neither the carrier nor the shipper is secure from the inroads of the Legislature. His obligations are to carry all freights offered at reasonable and equal rates, to make no unjust discriminations in favor of individuals or localities, and to become the insurer of all articles transported by him; his correlative right, the exaction of a reasonable compensation. Strip him of these, and he is no more a common carrier than a jury of six is a jury within the meaning of the clauses in all our constitutions.

Angell on Carriers, 122.

It is idle to say that the Constitution protects the corporation in the right to exercise the vocation, and prohibits the legislature from impairing or destroying it, if it is conceded that it is competent to deprive it of every attribute in which consists its value, or which makes it anything more than an empty name. Authorities are not wanting of persuasive force upon this question. The Supreme Court of Illinois says: "In their charters the rights and duties of the companies are either expressed or implied, when created bodies corporate they became invested with the right to construct and use their roads to transport both persons and property over their lines and to receive compensation for the same: and when these bodies accept their charters, it is with the implied understanding that they will fairly perform the duties of public common carriers of both persons and property.

Peoria & Rock Island R. R. Co. vs. The Coal Valley Mining Co., 5 *Ch. L. News*, 338.

In the celebrated freight case recently decided by the Supreme Court of Illinois, in which they held that the companies were bound by the common law as common carriers to make no unjust discriminations in their tariff of rates, and that the legislature might pass laws punishing them for a violation of their common law obligations, but holding that the law as passed making *all* discriminations unlawful was void, that it should only punish unjust discriminations, and leave the question as to what discriminations were un-

just, to the courts—a doctrine with which we entirely concur, and which, as we shall hereafter see, is sustained by the authorities. The court says: "A railroad company is chartered, and is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier. The duties and liabilities of common carriers are clearly defined by the common law, and have been so defined for centuries. In all commercial countries the law upon this subject is one of the most important branches of legal science, and its leading principles were established by the courts of England at an early day. One of these principles is, that nothing excuses the carrier for the non-delivery of the goods received by him for carriage except the act of God or the public enemy. We do not find it written in the charters of railroad companies in this State that they shall exercise their franchises subject to this stringent liability, yet, nevertheless, this court has firmly held them to it, not permitting them to evade it even by a notice or by any means short of a special contract, &c. The common law duties of common carriers are not prescribed in the charters of railroad companies, but attach to them by virtue of their franchises of common carriers the moment they commence the transportation of freight. In accepting their charters, which gave them an artificial existence as common carriers, they necessarily accepted them with all the duties and liabilities attached by the existing law to the vocation of a common carrier. This proposition seems to our mind so plain as hardly to admit of more argument than an axiom in mathematics."

The Chicago & Alton R. R. Co. vs. The People, 5 *Ch. L. N.*, 266.

The Supreme Court of Maine says, in an action brought against a railroad company for illegal discriminations: "It is admitted that the defendants are common carriers. Common carriers are bound to carry indifferently within the usual range of their business, for a *reasonable* compensation, all freight offered, &c. For similar equal services they are entitled to the same compensation. All applying enjoy an equal right to be transported or to have their freight transported in the order of the application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation they are liable to an action if they refuse to transport freight or passengers without just ground for such refusal. Such is the common law on the subject. The special stipulations inserted in charters for the purpose of securing these rights are placed there in an abundance of caution, and affirm nothing more than the common right to equal justice which exists independent of such provisions."

New England Ex. Co. vs. Maine Cent. R. R. Co., 57 *Maine*, 188.

If it be true, as all these cases affirm, that all the stringent and onerous duties and liabilities of common carriers are imposed upon these corporations by the mere acceptance of a charter creating them common carriers, although not written therein, it is difficult to see upon what principle

of logic the correlative right to a reasonable compensation does not also attach.

The concession of the State court "that there is, as a necessary incident to the grant, a right to *some* tolls but not to reasonable tolls," is fatal to the logic of the opinion. If the right to exact tolls is derived, as the court claims from implication merely, then with it passes all reasonable and necessary incidents to accomplish the object of its existence. (*See Sup. Court*, 11 *Minn.*, *cited ante.*) One of the objects of its existence, and the only one to which any tolls are necessary or incidental, is to promote the interests of the stockholders, but that can only be done by implying a right to reasonably remunerative tolls: a right to take *some* tolls, if inadequate and insufficient to defray the expense of the road, is logically no more incidental or necessary to promote that object than the right to take no tolls at all; either would be fatal to the interests of the stockholders—the difference is only in degree.

b. If we have succeeded in establishing the proposition that the right to take reasonable compensation as a right attached to the vocation of a common carrier is vested in the company, it follows that the question as to what are reasonable tolls, is a judicial one, and which the legislature has no constitutional power to determine, and is exactly analogous to the case of

Chicago & Alton R. R. Co. vs. The People,

cited ante, in which it was held that the question as to what

discriminations were unjust, was for the courts, and that the legislature had no power to determine it. But a more instructive case, and one exactly in point in here is that of

Commonwealth vs. Proprietors of New-Bedford Bridge, 2 *Gray* 339,

In which a grant had been made to a corporation of the right to construct and maintain a bridge with a *suitable* draw, which shall be at least thirty feet wide. The legislature afterwards passed an act requiring that the draw should be not less than sixty feet wide. The Court say: "Upon familiar and well-settled principles, the act when accepted by the defendant was an executed contract between them and the Government, by the terms of which, as contained in the charter, both parties are equally bound."

While this was admitted by counsel, it was still strenuously claimed, as it will be here, that the term "suitable" being in its nature indefinite and uncertain, did not fix and absolutely settle the duty and obligations of the defendants in this particular, and by necessary implication the legislature had the right reserved to them of saying what should be deemed suitable, as the legislature of Illinois undertook to say what should be deemed unjust, and as the legislature of this State by the act of 1871, (see p. 61 Gen. Laws, 1871,) have undertaken to say what shall be deemed reasonable freights; but the court say:

"But we cannot yield to the force of this argument. It is founded on an entire misapprehension of the relations of

the parties as created by the act of incorporation. They are both parties to a contract; each has equal rights and privileges under it, and neither can interpret its terms so authoritatively so as to control and bind the rights of the other. The Commonwealth has no more power or authority to construe the charter than the corporation. By becoming a party to a contract with its citizens, the government divests itself of its sovereignty with respect to the terms and conditions of the compact, and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of the parties contracting with the sovereign, would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged exercise of misguided power. The interpretation and construction of contracts when drawn in question belongs exclusively to the judicial department of the government. The legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial power."

Second.—But the right to a reasonable compensation and to be protected in its exercise is resisted on various grounds.

1st. It is said no right to compensation is expressly granted, and none can result from implication. It only remains in addition to what has already been said, to examine the cases usually relied on in support of this position.

It will be seen that they are glaringly inapplicable. The case of *The Proprietors of the Canal Bridge vs. Gordon*, 1 *Pick*, 296, was the grant of the right to build a mill dam for the purpose of operating mills, a roadway being contemplated over it, no provision whatever being made authorizing the corporation to charge parties for the use of the road. Parker J. said: "It would seem by the provisions of the act that the principal object was the erection of mills, but the dam was also intended to be used as a road, since it was required that there should be a railing and lights, and the width was to be such as can only be necessary for a road. No toll whatever was established for passing over this road, the legislature probably considering that the great water privilege given, and the probable profits of the works upon the dam, would be sufficient compensation for the expense of making and maintaining a passage over its surface."

We are not aware that anybody ever claimed that a grant of a right to erect a mill dam carries with it as incident and necessary to its enjoyment, the right to establish a toll-gate on the top of it.

Perrine vs. Chesapeake and Delaware Canal Co., 9 *How.* 172, was the case of a canal built under charters, which operated and were intended to operate, as a compact be-

tween the States of Pennsylvania, Maryland and Delaware. The intent of Pennsylvania was to make the navigation as far free as possible, and except the toll explicitly agreed upon between the States; hence she inserted in the charter granted by her a clause "that the corporation should derive no other power under this act but such as are set forth, &c., or necessarily incident to a corporation. "Tolls for freight were prescribed in detail, but no provision whatever was made for any charge to passengers, and the court, so far from adopting the narrow and illiberal rules of construction advocated by the counsel for the appellant in the State Court, after reviewing the history of the legislation and construing the provision above quoted of the charter granted by her, in view of the known intent and object of that State, decided, "in view of the general object and policy of these charters, that it was not the intention to restrict the passage of passengers or exact toll of them."

The case of *Camden & Amboy R. R. vs. Briggs* was a case where the company were authorized to construct a railroad and to collect such tolls *thereon* as the directors might prescribe, not exceeding certain rates, and the company *was required* as incidental to the main enterprise to run a ferry boat to and from its cars over public waters lying partly in Pennsylvania, New-York and New-Jersey; and it was held that the legislature contemplated that the power to collect tolls should embrace the entire business of the road, and a special toll for the ferry should not be charged.

Every such case has been decided upon clear evidence of the legislative intent appearing in the charter, and none, we venture to say, upon any such rules of construction as were urged in the State court and are repeated here.

Charles River Bridge vs. Warren Bridge; Binghampton Bridge cases, and other cases of like character, simply hold, that if the charter grants an exclusive right for a ferry or bridge within certain limits it is a vested right; but if not exclusive the legislature may authorize another bridge or ferry, although it may incidentally affect the profits of the old one—a doctrine well settled. The latter case is a strong authority for the defendants in this case.

Judge Redfield, in a note to *Philadelphia, Wilmington & Baltimore R. R. vs. Bower*, 13 *Am. L. R.* 174 cites these cases as authority for the position "that corporations, like natural persons, enter upon their business subject to future legislative control," a proposition which is correct in a certain limited and restricted sense—in so far as all property by whomsoever held is subject to the police power of the State when exercised within legitimate limits, but is untrue as we shall hereafter see, as applied to the sole source of revenue and income of a business corporation.

But the learned editor seems to be swaying to the popular breeze, and when he complains that the Delaware Court of Errors and Appeals misconstrued his opinion as reported in *Thorp vs. The Rutland & Burlington Railway*, 27 *Vt.* 140, (in which he used the following decided language, "It must be conceded that all which goes to the constitution of

the corporation and its beneficial operation is granted by the legislature and can not be revoked either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract and so prohibited by the United States Constitution, and that the privilege of operating the road, or taking toll, or freight and fare, is the essential franchise conferred—any act essentially paralyzing this franchise or destroying the profit therefrom arising would no doubt be void,") we can hardly suppress the opinion that the editor of the *Register* is seeking to overrule the Chief Justice of Vermont.

In the Charles River Bridge case and its successors in the same course of decision, as remarked by the Supreme Court of New York in *Benson vs. Mayor of N. Y.*, 10 *Barb.* 223, the legislature did not attempt to take away the identical franchise, and no one ever contended or supposed that it would be competent to do so. The argument against the legislation was, that it was not competent to do that indirectly which it was conceded could not have been done directly. A formidable array of authority, including Chancellor Kent and Judge Story, is opposed to even this doctrine, which seems also to be contrary to the law as understood as to similar grants in England.

See the exhaustive dissenting opinion of Judge Story in *Charles River Bridge vs. Warren Bridge*, 11 *Peters* 584.

3 *Kent Com.*, 460 *and note.*

8 *Bacon's Abr. Title Prerogative, p.* 114.

But while it is too late to question the authority of those cases, no disposition has been shown to extend the principle involved in them. See

Binghampton Bridge, 3 *Wal.* 51.

Certainly the vital principle in a railroad corporation is the power as a common carrier to charge reasonable rates of compensation. It is on the faith of this and this only that the capital of the projectors is invested. It is said they ought not to exercise an unrestrained power. They do not. By the common law they are restricted to a reasonable compensation, and this whole controversy is to withdraw a judicial question from the domain of the courts into that of the legislature.

What does the Constitution protect if not the common law right to reasonable compensation? In this case the legislature has interfered and prescribed rates unreasonably low. Its power is arbitrary and unlimited, when once wrested from the restraints of the Constitution.

The Constitution of the United States expressly reserves to the State all powers not delegated to the general government. Surely as strict a construction should be given to such a grant as that to a corporation. No express clause inhibits the taxation by the states of national securities, but it was held in

Mc Culloch vs. Maryland, 4 *Wheaton* 415,

in effect, that since such a power in the state involved the right to destroy and strike down the national government at the feet of the states, an implied inhibition existed, and

to the argument that the presumption was that the states would not abuse the power it was replied, "that this was not a case of confidence." We are unable to see why the same argument may not be legitimately invoked to protect the vast interests invested in the railroads of the country against legislative invasion.

2d. It is boldly claimed that the right in the company to exercise the power of eminent domain, flows as a corollary from the right in the legislature to regulate the charges the company may make *in any case*, even if this right is explicitly conferred by the charter upon the corporation. No adjudged case can be found which supports this extravagant claim.

Beekman vs. Saratoga & Schenectady R. R. Co., 3 *Paige, Ch.* 44; *Bloodgood vs. Mohawk & Hudson R. R. Co.*, 18 *Wend.* 10, *West River Bridge Co. vs. Dix*, 6 *How* 793, *and Charles River Bridge vs. Warren Bridge*, 7 *Pick.* 344, are sometimes cited as containing dicta of judges favoring the position that a railroad company, no matter how explicitly the power of regulating tariffs is conferred by the charter, holds its franchises in every instance subject to regulation and destruction by legislative power.

The first two cases were decided in the early dawn and twilight of American railroad enterprise; the question was not involved, and the ideas of counsel and court as to the exact nature of the franchises of a railroad company were neither very clear nor very accurate. The objection was

made in both against the right of the exercise of the power of eminent domain by a railroad company, that the company was under no obligation to accommodate the public with transportation, and that it was unlimited in the amount of tolls which it was authorized to take; objections utterly baseless, and in which the distinguishing features of the business of a railroad, *i. e.*, that of plying the vocation of a common carrier was entirely lost sight of. Indeed, the only analogy which experience at that day furnished lawyers and judges were turnpikes, ferries and bridges, which the traveler entered upon with his own vehicles and paid a *toll* for their use, and it seems to have been thought, and the early charters were passed with a view, that railroads might be so used. See

Boston & Lowell R. R. vs. Salem & Lowell R. R., 2 *Gray* 28.

But the instant a railroad corporation is considered as a common carrier, these objections vanish, it is required by the common law to serve all who apply and at reasonable, uniform compensation.

In answer to these objections, however, the court said *in the first case*, that the corporation might be prosecuted for refusing to carry, and the legislature might regulate the fare as in case of a ferry or mill, *unless they have deprived themselves of that power by a legislative contract with the owners of the road*," and in the second that "*the legislature have reserved to themselves the right to alter, amend or modify the act of incorporation.*"

It will be seen that the right of legislative regulation, was rested by the court in both cases upon a reservation of such right in the charters of the companies.

The dictum in West River Bridge vs. Dix is not that of the court, but of Mr. Justice Woodbury, (Daniels J., delivering the opinion of the court.) He says "the only ground on which a corporation, private in interest is entitled in any view to condemn land or collect tolls is that the use of the bridge is public, is open to all, and at rates of fare fixed by the legislature, and not by itself, and subject to revision and reduction by the public authorities."

This would only prove that a private corporation, with power to carry at reasonable rates guaranteed to it by the constitution and beyond the reach of legislative restraint could not constitutionally exercise the right of eminent domain. But Judge Woodbury took a much too narrow view of this power, and one that certainly at this day does not obtain.

The grounds upon which it is exercised are much broader than as stated by him, nor can the right to regulate the private commercial interests of a private corporation be logically deduced, as is often attempted, from the power to condemn lands or levy taxes in aid of these enterprises.

When it is conceded that the pecuniary rights of a corporation are protected by its charter from invasion, it might be perhaps with some show of reason argued, that the two great governmental powers of eminent domain and taxation should not be exercised in favor of a private corporation,

but to reason backward, and say that because these powers have been exercised in their favor, therefore they have lost all right to invoke constitutional protection to their property interests, is illogical and unsound.

These corporations in the law sustain a dual relation to the public: the one, as the incidental benefactors of the public by opening long lines of traffic and transportation, to which all by the common law have access on equal reasonable terms, by developing all the resources of the country, peopling and unlocking to emigration uninhabited districts, building up towns and cities, stimulating all the interests of commerce, agriculture and manufactures, and in fine, aiding in the increase of national wealth, prosperity and power; the other, the relation they hold to the public as private parties pursuing a private business under chartered powers and contracts by which their property is made inviolable. The former is the only true ground or real source from which the exercise of the powers of taxation and eminent domain can be traced, and such is the modern doctrine. Many of the most extensive manufacturing establishments of the country, which, while proving a never failing source of wealth to their proprietors, have built up thriving cities and villages around them, and furnished employment for millions of operatives, have been inaugurated solely by means of the exercise of the power of eminent domain, and yet, no breath of the *commune* has ever menaced them with regulation of prices, or destruction or injury to property.

The best modern definition of the term "public use," which will justify the resort to this power, is that of the Supreme Court of Massachusetts. "In a broad and comprehensive view, such as has been heretofore taken of this clause in the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community, and it is on this principle that many of the statutes of this commonwealth upon which private property has been taken and appropriated to a supposed public use are founded."

Talbot, et al, vs. Hudson, et al, 16 *Gray*, 417, 425.

It is true that the courts while extending to railways the power of both taxation and eminent domain, and that, too, without any regard to whether the charter contained an irrevocable grant to the company of the power of regulating its tolls, or not, have somewhat illogically, as it would seem, declined to extend the former power to other enterprises as mills and manufactories, not for the reason that the right to regulate tolls existed in one case and not in the other, but apparently because the railroad is more distinctively, as a highway, a public use than a manufactory, and possibly because in the case of eminent domain, an adequate compensation is supposed to be paid for the pro-

perty taken in addition to the general benefit received, while in the case of taxation the property is taken without compensation save the uncertain share in the public benefit which the tax payer may enjoy.

But without stopping to discuss a distinction in the scope of the term "public use," as applied to different powers of government, one thing remains certain, that the modern decisions sustain the exercise of the power of eminent domain without any reference to the power to regulate property interests.

Shaplies v. Mayor of Phila 21 Penn State R 169.

See Talbott vs. Hudson, cited ante.

Olmsted vs. Camp, 33 *Conn.*, 532.

Miller vs. Troost, 14, *Minn.*, 365.

Hazen vs. Essex Co., 12 *Cush.*, 475.

The constitutional exercise of this power in the case of manufactories, the profits of which the legislature have no power to regulate, and which confer no direct or other than incidental benefit on the public, is recognized by this court as undoubted in

Holyoke Co. vs. Lyman, 15 *Wallace*, 500.

The remark of Morton J. in the Charles River Bridge case, which was the dicta of a single judge on a question not material to the decision, was based upon this state of facts. The proprietors of Charles River Bridge, organized under a charter authorizing them to take a certain toll therein prescribed for a term of years, claimed that it was an invasion of their rights to erect another bridge which should lessen their receipts, both because of their bridge

charter and because they were the grantees of an ancient ferry, the income of which had been granted to Harvard College under provincial laws, and which by the English law was an exclusive right of ferriage, and could not be interfered with by the grant of a subsequent ferry.

It appeared to have been the universal usage, acquiesced in by the college, for the provincial general court, which was unrestrained by constitutional enactment, to regulate rates of ferriage, and indeed no right seems ever to have been granted to the college except that of receiving the current income, whatever it might be, and in disposing of the claim Judge Morton remarked, referring to the ferry franchise, that it appeared from the several acts and the usage under them, that the college held the ferry subject to the general control and regulation of the legislature, but no body pretended that the tolls granted for a term of years to the proprietors of Charles River Bridge by its charter, could be thus regulated. But bridge cases furnish no authority and a very imperfect analogy, as the common law restriction upon the rates of common carriers, which makes legislative control wholly unnecessary, has no application to bridges.

Far back in the annals of American Jurisprudence stands the case of *Dartmouth College vs. Woodward*, 4 *Wheaton*, 463, decided by this court, in an opinion where purity of diction, an enlightened and comprehensive survey of the interest of the Republic in all coming time, and a clear and convincing logic, are combined as they only

could be combined by the exalted wisdom, learning and patriotism of John Marshall, aided by the glorious eloquence and powerful reasnonig of Webster. The case is one of the great land-marks of the law, followed from 1819 to the present in repeated decisions, and under it the United States have achieved a prosperity unknown in the annals of any other nation. Capital, secure in the guarantees of the fundamental law as expounded by the courts, has freely flowed out into all the channels of commerce and manufactures. Mammoth corporations wielding immense resources and furnishing employment for millions of operatives, have sprung up all over the land. A magnificent railroad system has not only opened the Mississippi Valley to the markets of the world, but has alone made its settlement possible.

The court in language particularly applicable to railroad corporations says: "The benefit to the public is considered as an ample consideration for the faculty it confers. If the advantages to the public constitute a full compensation for the faculty it gives them, there can be no reason for exacting a further compensation by claiming a right to exercise over this artificial being a power which changes its nature and *touches the fund for the security and application of which it was created.*

See also *Phil., Wil. & Bal. R. R. vs. Bowen*, 13 *Am. L. R.* 174.

It has been claimed that in *Alcott vs. Supervisors of Fon du Lac County*, in the Supreme Court of the United States

on appeal from the Supreme Court of Wisconsin, Judge Strong made use of language indicating a disposition to recede from the position taken in the Dartmouth College case. This is a mistake. The case was on the validity of town bonds issued to a railroad company, and the Judge says, "That the legislature may alter or repeal the charter of the Sheboygan & Fon du Lac railroad company is certain. This is a power reserved by the constitution. The railroad can therefore be controlled by the State. Its use can be defined. Its tolls and rates of transportation may be limited."

Alcott vs. Supervisors of Fon du Lac Co., 5 *Ch. L. N.*, 398.

The clause of the Wisconsin constitution, under which the decision was made, is as follows: "Article XI, Corporations"—"Sec. 1. Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. *All general or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.*"×

Of course, if the corporation accepted its charter under a State constitution, which reserved the right to regulate tolls, there could be no question about the power of the legislature to do so. At present, in the absence of such reservation the inviolable nature of such contracts is regarded as too

× and the Supreme Court of Wisconsin have just held in the case of Atty Genl v. North Western R. R. Co. not reported that as to charters granted prior to the constitution there is no power to regulate charges

well settled in this court to admit of discussion.

Humphrey vs. Pegues, 16 *Wal.* 244.

Wilmington R. R. Co. vs. Reed, 13 *Wal.* 265.

So the case cited by Judge Redfield, in his note to the Baltimore case, of the right to regulate deposits in a Saving's Bank as to existing corporations, was under a general law reserving the right to alter, amend, and repeal all charters. *Mass. Genl. Hospital vs. State Mut. Life Ins. Co.*, 4 *Gray* 222. Indeed, the Supreme Court of Vermont, while refusing to sustain a law condemning land for a mill because the use was not thought to be a public one, (in which position that court stands alone against a nearly unanimous array of modern authority,) concedes the power in the case of a railroad, not because the legislature have any power to regulate tolls, "*but because all persons have the right to ride and to have property carried on them in the vehicles of the road on payment of a common charge.*"

Tyler vs. Benton, 44 *Vt.* 648, and upon this ground also is put the case of *Lumbard vs. Stearns*, 4 *Cush.* 60.

3rd. But railroads, it is said, in analogy to ferries, highways and bridges, are *publici juris*, and tolls are a tax always susceptible of regulation. The term tolls is an inaccurate one as applied to the compensation of a common carrier, and the analogy between a common carrier by railway and turnpike companies, ferries, and bridges, is false and delusive.

For the benefit of a common carrier who, by common

law, is obliged to serve all the public on reasonable and equal terms, the right of way is obtained by the exercise of one of the governmental powers, such use being, by reason of these common law obligations, of a direct public benefit, but when obtained in all their subsequent relations with the public, it will avoid confusion to discard all these fanciful analogies, and treat them as what they really are, as neither more nor less than common carriers.

Judge Redfield says, "the matter of tolls upon railways is a thing almost unknown in this country, and very little practised anywhere at present." 1 *Red. on Railways*, 448.

But if the analogy were perfect, we maintain that no case can be produced where it has been held that a grant of a turnpike, bridge, or ferry franchise, whether from the King, at common law, or under our American Constitution, could be impaired by a subsequent grant or an unreasonably low and ruinous rate of toll prescribed by the law-making power, unless such reservation of power was contained in the grant. No intimation of any such destructive reserved power can be found in the usually accurate and exhaustive treatise of Chancellor Kent. 3 *Kent Com.* 458.

Washington, J., in the Dartmouth College case, quoting from Blackstone and adopting the definition, says: "A franchise for a number of persons to be incorporated and exist as a body politic, with a power to maintain a perpetual succession and to do corporate acts, (and each individual of such corporation is also said to have a franchise or freedom,) this franchise, like other franchises, is an incorporeal here-

ditament issuing out of something real or personal, or concerning or annexed to or exercisable within a thing corporate. To this grant or this franchise the parties are the king and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. The subject of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and hold property in perpetuity. Certain obligations are created, binding both on the grantor and grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. It implies, therefore, a contract not to re-assert the right to grant the franchise to another *or to impair it.*" 4 *Wheat.* 501. Such is the common law. *A fortiori* no such destructive power can exist under the federal constitution.

4th. But it is said there is a reservation of a right to amend. It is fair to assume from the entire course of legislation hereinbefore set out that capital could not be procured to prosecute the enterprise under such a general clause as was contained in the original charter, and hence, at the next session of the legislature, before any work was done or any capital invested, (for we have seen the legislature, years afterwards, providing for the commencement of the road within a certain period thereafter,) the charter was amended providing that "it might be amended in any man-

ner *not destroying or impairing the vested rights of the corporation*," and the entire outlay of capital was made upon the faith of this guaranty.

From the time that Section 16 of the original charter, (being the one reserving the right of amendment), was amended "so as to read as follows," which is the language of the amendment, the amendment became incorporated into and a part of the charter of the company, and from that time the section as it originally stood ceased to have any existence.

Humphrey vs. Pegues, 16 *Wal.*, 244.
Tomlinson vs. Jessup, 15 *Wal.*, 454.

The attempted statement, in the brief of defendant in error, of the grant to the present company, after the foreclosure, to the State, does not purport to be a quotation, and does not accurately state the effect or purport of the language of the grant, which is: "That all the rights, benefits, privileges, property, franchises, and interests of the Southern Minnesota Railway Company, acquired by the State, by virtue of the foreclosure, or any act done or suffered by the company, &c, pertaining to the line of said road and branches prescribed in an act to incorporate the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, 1855, and in the several acts amendatory thereto, and all the rights, privileges, franchises, lands, property and interests granted by the Territory of Minnesota, to the Root River Valley and Southern Minnesota Railroad Company, or the Southern Minnesota Railroad

Company by the several acts of the legislature of the Territory of Minnesota, the one entitled, an act to incorporate the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, 1855, and of the several acts amendatory thereof, and an act entitled an act to execute the trust created by the act of Congress, entitled an act making a grant of lands in alternate sections to the State of Minnesota, &c., approved May 22, 1857, and pertaining to the lines of road and branches prescribed in said act of incorporation of the Root River Valley and Southern Minnesota Railroad, approved March 2d, 1855, and the several acts amendatory thereof are hereby granted and transferred to (naming the corporators) and their associates and successors, with all the immunities, rights, property, benefits, and privileges, which the said Root River Valley and Southern Minnesota Railroad Company or Southern Minnesota Railroad Company had or might or could have by reason of the passage of said act."

"For the purpose of carrying ont and effecting the objects of this act, the Southern Minnesota Railroad Company and their successors and assigns, shall have and be possessed of all the powers, immunities, rights, franchises, and privileges contained in and provided for in the said two acts, referred to in this section, (meaning the act vesting the land grant in the company, of May 22d, 1857, and the act of incorporation, and amendments which had repeatedly before been mentioned and treated as one act), and be subject to all the conditions and provisions of the said act," meaning

the act last named, viz: The act of incorporation as amended.

No reservation of a right to amend, modify, or repeal corporate charters exists in the constitution of the State or in any general law, and no such reservation was made in any subsequent acts, after the amendment of 1856.

It is a significant fact as illustrating the legislative construction put upon this charter and the rights of the company under it, in respect to regulation of rates, that in the act of February 26th, 1867, in a grant of lands to the company, the legislature sought to force upon the company and compel their assent to a clause reserving the right to the legislature to regulate freight and passenger tariffs, and required the company to accept the act within thirty days, and finding that at the risk of losing a valuable land grant, the company would not consent to a concession so ruinous, before half the time limited for the company to accept had elapsed, they repealed the obnoxious clause.

The reservation, however, as it stood in the original act, of the right to amend, would give no right of absolute repeal, and no power of absolute destruction.

Under it, it is conceived the legislature would have no power arbitrarily to interfere with the rates of the company, which were reasonable, and prescribe an unreasonably low rate which would deprive the company of reasonable returns on their investment. If this could be done, they might with equal right take away all remuneration, and compel the company to operate its road without reward,

or, upon its failure to do so and perform the public duties assumed by it as its part of the contract, to forfeit its franchises and thus confiscate its property, or what is equivalent, ruin its value.

Even under the broadest reservation of power to amend, alter, or repeal, no court would sustain this wholesale destruction of the most vital of all the vested rights of a corporation, viz: The right, so long as it exists, and its obligations remain to perform its public duties, to operate its road, serve all the public, and transport all freight and passengers, to a reasonably remunerative compensation.

Under such a power, while the legislature may repeal, yet they can not hold the company to its public duties and paralyze the arm by which alone they can be performed. This court has said, in regard to an absolute right to alter, modify or repeal, "vested rights, it is conceded, can not be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised to almost any extent to carry into effect the original purposes of the grant, and to protect the rights of the public, and the corporations, or to promote the due administration of the affairs of the corporation.

Holyoke Co. vs. Lyman, 15 *Wallace*, 500.

This reservation is said by the Supreme Court of Massachusetts to reserve to the legislature the power to make any alteration or amendment *that will not defeat or substantially impair the object of the grant*, or any rights that have vested under it.

Com's of Fisheries vs. Holyoke Water Power Co., 104 *Mass.*, 451.

Commonwealth vs. Essex Co., 13 *Gray*, 239.

Can a reduction of freights below a reasonable rate, can the deprivation of the company of a reasonable return for its investment, and compensation for its services, it being compelled by its contract with the State to a continued performance, be said to carry into effect the original purpose of the grant, or to protect the rights of the public, which surely had the right to nothing more than transportation on reasonable terms? Does it provide for the due administration of the affairs of the corporation, to require it to carry at unreasonable rates, and indeed at rates which the constitution of the State forbids? Does it not substantially impair the object of the grant, one object of which was a reasonable remuneration to the stockholders, to reduce this remuneration below a reasonable point?

It seems to us that if this would be so under a broad clause reserving an absolute right to alter, modify, or repeal, *a fortiori* must it be so when a simple right to amend is given, and that a sweeping general law, like that of 1871, would not be held as an amendment of this charter. If we are right in this, the discussion as to the effect of the amendment becomes immaterial.

5th. But the effort is made which is always resorted to when invasions of vested rights are sought to be defended, the shadowy and undefined reserved power of the State known

as the police power is invoked. Now, while it may be somewhat difficult to define this power with precision, and to enumerate all the cases to which it may under circumstances reach, it is not very difficult to point out cases to which it does not extend, and certainly the regulation of the profits which a corporation shall enjoy under its charter has never before been claimed, or supposed to be within its reach. If it is, it is difficult to see what vested right would be safe from a power so omnipotent and all-pervading. Mr. Cooley, in language which excludes the present case, says: "The regulations must have reference to the comfort, safety, or welfare of society. They must not be in conflict with any of the provisions of the charter, and they must not, under the pretence of legislation, take from the corporation any of the essential rights and privileges which the charter confers."

Cooley on Con. Limitations, 576.

The power is based upon maxim: *Sic utere tuo, ut alienum non lædas.* Perhaps the most exact definition has been given by the Supreme Court of Vermont: "The police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State."

Thorp vs. Rutland & Bennington R. R. Co., 27 *Vermont*, 149.

A very exact illustration as applied to corporations has been given by the New-York Courts: "Franchises of this description are partly of a public and partly of a private

nature. So far as the accommodation of passengers is concerned, they are *publici juris*. So far as they require capital and acquire revenue, they are *privati juris*. Certain duties and burdens are imposed upon the grantees, who are compensated therefor by the privilege of taking tolls, levying ferriage, &c., and the security from spoliation arising from the irrevocable nature of the grant. The State may legislate concerning them so far as they are *publici juris*. Thus, laws may be passed to prevent neglect or misconduct in conducting the ferries; to secure the safety of the passengers from danger and imposition. But the State cannot take away the ferries (railroads) themselves, nor deprive the corporation of their legitimate rents and profits."

Cooley on Con. Lim., 576, *and note.*

It is precisely on this distinction that in view of the danger to passengers from allowing the road to remain unfenced, the legislature may require the company to fence its road, which is the case of *Winona & St. Peter R. R. Co. v. Waldron*, 11 *Minn.*, 575.

The only case which the State Court cites in support of its decision is, *Commonwealth vs. Alger*, 7 *Cush.*, which was a case of a legislative enactment regulating Boston Harbor and establishing wharf lines, and thus unavoidably interfering somewhat with the absolute right of use of the flats between low and high water mark, which by an early colonial ordinance had been ceded to the owners of the adjoining uplands. Under the peculiar circumstances of the case, and in view of the fact that the government had the

undisputed power to regulate coasts and harbors, the Court held it a proper exercise of the police power. The labored opinion of Chief Justice Shaw clearly shows that he thought he was pushing the doctrine to the extreme verge of the law. We are unable to see the slightest analogy between that case and the case at bar, the real point on which the case turned being, that the right of free fishing and navigation was a public right, and could be controlled by legislative act, though private rights were injuriously affected.

In a recent case in Pennsylvania, where a corporation had by charter a right to maintain a dam in and across a public river, and the legislature afterwards required it to make and maintain sluices for the free passage of fish, which would seem quite as strong a case as that of Commonwealth vs. Alger, the court says, the control of the waters of the State has perhaps been carried further as a police power in Massachusetts than any other where the common law prevails, and denying the correctness of the Massachusetts doctrine, held the law in question unconstitutional, as an unwarranted interference with vested rights.

Commonwealth vs. Penn. Canal Co., 66 *Penn.*, 41.

The decision most directly in point as to the police power as applied to corporations is that of the Court of Errors and Appeals of Delaware, in *Philadelphia, Wilmington & Baltimore R. R. Co. vs. Bower*, cited *ante*, decided, we believe, during the present year, and the true distinction upon which the limitations of this power rest are well stated by Chancellor Bates: "The legislature may at all times regu-

late the exercise of the corporate franchise by general laws passed in good faith for the legitimate ends contemplated by the state police power, that is, for the peace, good order, health, comfort, and welfare of society, but it cannot, under the color of such laws, destroy or impair the franchise itself, nor any of those rights or powers which are essential to its beneficial exercise. Thus, acts regulating the mode of carriage of passengers with a view to their safety, or regulating the speed of trains through towns or cities, or prescribing certain precautions for the public safety at crossings, or requiring the erection of fences, etc., are the proper exercise of the power of police regulation. Such acts leave the franchise unimpaired, and simply regulate the exercise of it in some particulars plainly essential to the general safety, health, or comfort of society. But quite different are acts which directly touch the constitution of the corporation, or abridge or modify any of those corporate powers which are essential to the very ends of its creation. Such powers, for example, as the right to operate a railroad at all, *the right to take tolls, fares, or freight, or to adjust their tariff of such charges.* These are not police regulations, but are in substance and effect amendments of the charter, and it is obvious that, if, under color of the police power, corporations may be thus dealt with, the constitutional provision so solemnly adjudged by the Supreme Court to be a protection to their rights, is, after all, as to them wholly nugatory."

b. But it is urged that we claim the right to exercise the vocation of a common carrier, clothed with all his common law rights and subject to all his common law liabilities; that at common law a ~~private~~ non-corporate common carrier was subject to regulation by the legislature, and that they might pass laws to protect the public from extortion and might regulate his charges and tariffs, and the answer to this objection may properly constitute a separate point.

Third. Aside from the protection of our charter, we maintain that if we had none, our property, or what is its equivalent, the enjoyment of its income, could not be taken from us save by due process of law. But first as to our rights as a corporation. Of course, in England, Parliament was supreme, and every subject held all his rights of life, liberty, and property at its sovereign control, unlimited by any written constitution, and if it be conceded that no charter can confer common law rights exempt from legislative invasion, because at common law parliament might have destroyed individual rights, the argument may be sound, not otherwise. We invoke a charter which guarantees to us the rights of a common carrier, and refers us to the common law as the measure of those rights. Whatever it might have done, no parliament ever did attempt to regulate them, and under our American Constitutions it would not be competent for the legislature arbitrarily to

regulate prices of produce, the wages of labor, or compensation of a common carrier, even as to ~~private~~ natural persons.

It is as a common carrier, clothed with his common law rights and liabilities, that we invoke the protection of the court. The possibility of destruction by an act of parliamentary tyranny and oppression was not among his common law liabilities. He merely held his property and his right to enjoy its income subject to the same bare contingency that every subject held not merely his property but his liberty and his life, while that possibility, thanks only to the foresight of the framers of our fundamental law, no longer exists in this country, and the citizen is protected alike in the enjoyment of his property and the income and profits arising therefrom, without which it would be idle to talk of its enjoyment. But we challenge the production of a solitary case in which the right to arbitrarily regulate the rates of charge of ~~a private~~ even a non-corporate common carrier has ever been sustained by the courts, (and we doubt whether it has ever been attempted) if ever claimed as against any carrier it has been except under a power to do so expressly reserved in the charter of a corporation (not a mere right to amend or repeal) by which the corporation yielded some of the rights which a ~~private carrier~~ natural person possesses, or in cases where the regulation of charges has, being reasonable, been acquiesced in by the carrier. That regulations of this sort are in force in some states where no unreasonable and arbitrary exercise of this power has been attempted, and therefore no opposition aroused, is no argument in support of the power asserted and arbitrarily exercised by the statute of Minnesota of 1871.

If the supporters of legislative power in this regard, only claim the right to a *reasonable* exercise of it, they concede the whole question, and there is an end to the controversy, for, as we have seen, the common law restricts the carrier to reasonable rates, and an act of legislation fixing rates valid or invalid as the courts might determine the rates so fixed to be reasonable, or unreasonable, would add nothing to the efficacy of the common law rule. The matter would still be withdrawn from the domain of legislation and referred to the judicial tribunals of the country, where it properly belongs.

But the advocates of this power claim far more than this, and assert the right of the legislature conclusively to determine the rates fixed by them to be reasonable, and even though, as in this case, an unreasonably low rate is fixed, the courts are powerless for aught save the administration and enforcement of a confessedly unjust enactment, working confiscation of profits and ruin to the investment of the carrier, and it is just this power in the extent stated that we deny, and challenge the production of any precedent in legislation or judicial decision to sustain. There never was any occasion for such an attempt; the common law limited them to a reasonable compensation, and the courts were always open to enforce its mandates.

That general laws might be passed providing for prosecuting them for extortion in exceeding their common law rights and a reasonable amount of compensation, there can be no question, but further than this it is doubted if any

legislation has ever gone, until the recent foray on railroad property in the West.

The proposition to meet this case must be this: That under the constitutional guaranties of all our American governments, after a party has invested his capital in a business which he is prosecuting for a reasonable remuneration, the legislature may pass an arbitrary law "saying that services which are reasonably worth one dollar shall be performed for one-half that sum; saying to the farmer that his wheat which is worth one dollar a bushel, he shall dispose of for fifty cents a bushel; to the manufacturer, that his fabrics, which are reasonably worth one dollar per yard, shall be sold for one-half that sum: that this would be simple confiscation, the taking of property without due process of law, does not admit of a question. As well annihilate the property itself, as render it valueless by withdrawing its income. It is true that the Supreme Court of Illinois, after one of their ablest judges had been driven from the bench for a faithful and undaunted protection of the constitutional rights of property, has promulgated a doctrine in regard to non-corporate warehousemen which goes to this extent, or at least falls but little short of it. One judge placed his opinion upon the peculiar provisions of the constitution of that State providing for the regulation of warehouses, and Judges McAllister and Scott dissented, and the able dissenting opinion of the former states, we believe, the correct view of the law on the subject.

Munn et al. vs. The People, 6 *Ch. L. News*, 165, 173.

Not a single authority or precedent is produced in support of a practice which, if it existed, there would have been, in the long annals of the common law, such repeated occasion for exercising.

But the court relies upon analogies, the most delusive of all supports for a judicial opinion. 1st. It refers to the usury laws. The ready answer is, that at common law *all* interest was unlawful, because, according to Aristotle, "money was barren and would not breed money," and all laws modifying the common law rule have been concessions to the more enlightened spirit of a commercial age, and not restrictions upon the rights of property.

10 *Bacon's Abridgement, title "Usury,"* 264.

2d. Ferry franchises.

These were a branch of the royal prerogative, were always held by virtue of a grant from the king, and unless power was reserved in the original grant, no right to prejudice the grant, or to lessen its value by a reduction of tolls, was ever claimed or attempted.

3d. Mills.

It is conceded by the court in *Tyler vs. Busbee*, 44 *Vt.* 648, that as the act granting to mill owners the right to condemn lands contained no reservation of the right to regulate their use, no such right would exist. The only right ever claimed in regard to mills has come down to us from the common law and early colonial times, when grist mills grinding for toll were common, and is the right by an established polity well understood by all who invested their

money in a mill, to say that the proportion of grain which the miller should take for grinding should not be left to his conscience, but should be subject to legislative regulation. This was a practice existing at common law, and sprung from the right of the lord of the manor to erect a mill and compel all the tenants of the manor to bring their grist to his mill. No custom or law required the miller to grind for a reasonable compensation, and the tenant had no option but to take his grist there, and was liable to an action on the part of the miller if he took it elsewhere. Side by side with, and in consideration of the concession to the owner of the mill, grew up the practice of regulating the toll he might take.

Angell on Water Courses, 479, *and note* 2, 6 *ed.*

But until an authority shall be produced for a law passed after capital invested in a flouring mill which does not observe the ancient practice of grinding for toll, (as few do now,) declaring that the miller shall exchange or sell his flour for less than he has been accustomed to charge, and less than it is reasonably worth, as a barrel of flour for five dollars, which is worth ten, no analogy can be found in mills for the broad claim here advanced.

See Bartemeyer v Iowa 18 Wallace 129. 130

4th. But it is said laws have been passed regulating the weight and price of bread. It is true that laws have been passed from time to time in England to regulate bread and ale, which were regarded as the two prime necessaries of the poor, and like the laws against forestalling, regrating,

and engrossing, were police regulations to prevent and punish, in times of scarcity, practices, the direct tendency of which was the starvation or misery of the poorer classes, and to this principle, in part, may, perhaps, be traced the rise of the practice of regulating the toll of mills by which the grain was prepared for bread.

It is a little singular to observe in this age of clamor for agricultural rights as against those of railroads, that while no single precedent can be found for regulating common carriers, the sole precedent and authority is for regulating and preventing extortion by the producer of breadstuffs, and for the very good reason that the common law regulated the former but no principle of that law would compel the farmer to part with his products at reasonable prices.

5th. We are also referred to the regulation of the fares of hackmen in cities. The regulation of the stands, the numbering of their carriages, licenses, etc., are undoubtedly the subject of police regulation, and whether or not the danger of imposition and robbery of strangers in a large city by the hackmen justifies anything more than a law punishing extortion, yet as these persons are in no sense common carriers, are not at common law required to carry on reasonable or equal terms, and no other practical mode of restraining them except by a regulation of the fare exists, there would seem to be some reason for their subjection to the police power, although we do not find any such power ascribed to the domain of police regulation by treatises on that subject.

See Cooley on Cons. Lim., ch. 15.
Dillon on Municipal Cor., 326, 340.

All these cases, and they are the only ones which have been cited by the advocates of the right asserted in this action, are based on reasons having no application to common carriers, but are exceptional cases. Analogies drawn from the law of England, where parliament is supreme, would be of no authority under our American Constitutions, but it is a significant fact that with these few and obvious exceptions, no attempt has been made by the Laws of England to hamper commerce with such regulations, or to control the laws of supply and demand. As to common carriers whose rights and obligations were sufficiently regulated by the common law, as there was no reason for, so there is no instance of any such regulation. The instances referred to as analogies are some of them doubtful in principle, and the question involved never adjudicated under the constitutional provisions of this country, and all of them peculiar and exceptional cases, having their origin in the gradual growth of a custom in a country where, in the absence of a written constitution, the whole matter was a question of policy, and not of legislative power, were followed in the early colonial ordinances by legislatures, also untrammeled by constitutional restraints, and having become incorporated into the law and policy of the country, investments were made in view of such a state of the law, and it is probable that in cases where some of them have been adopted into the law, since

the adoption of a constitution, it has been because they have been found as established customs engrafted upon the common law of the land, and have been perpetuated without sufficiently considering the changes which our constitutions have effected in legislative power.

6th. But the right is claimed because, as it is said, the railroad corporation exercises a public employment. It is sometimes, indeed, by counsel of unusual hardihood, likened to a public office.

A public office is by every enlightened system of civil polity subject to legislative control and regulation; the man is selected for the office; the office is not created for the benefit of the incumbent. He invests no capital, and accepts the office and acquires a quasi property in it, only subject to its abolition, the increase of its duties and the decrease of its fees as the vicissitudes of the State may dictate as subservient to its best interests.

It is idle to say that the enormous outlay of capital which has spanned the continent with railways and revolutionized modern commerce, has been or shall be invested on any such terms, or that there is any sort of analogy between the cases. The most arbitrary government on earth has never yet ventured on any such summary mode of disposing of the property of its people, and the practical results of the successful advocacy of such doctrines, would be revolution, if applied to existing corporations and a general embargo upon all similar enterprises in the future.

But the railroad exercises a public employment as common carrier, just as common carriers and innkeepers have exercised a public employment from time immemorial. Both must receive all who apply within the limits of their accommodations, both are insurers of all goods intrusted to their charge. The most enthusiastic lawyer of the grange will concede, that in the traditions of the law, the analogy between a common carrier and an innkeeper is somewhat closer than that between a common carrier and a Justice of the Peace.

Can the legislature fix the charges of the Fifth Avenue Hotel, with its costly appliances of comfort and luxury, at $1 per day, or at the same rate as those of a humble country inn?

But it is said hotels do not require the use of the power of eminent domain." This is mere sophistry, and has been perhaps already sufficiently answered. The use of this power in cases of necessity by private corporations, gives the State no power over the capital or income of its stockholders.

If it did, and the whirling spindles of Lowell & Holyoke were at the mercy of popular caprice, the manufactories of America would fall blasted and paralyzed before the bare suspicion of a doctrine so monstrous, and yet, without the exercise of this power, these manufactories would never have existed.

Hassen vs. Essex Co., 12 *cush.*, 475.
Talcot vs. Hudson, 16 *Gray*, 416.

But whatever the law as to natural persons, when a common carrier has invoked the protection of a legislative grant, which protects him in his right to exercise that vocation, it is that vocation as it existed at common law with all its distinctive features, the right to a reasonable compensation, and not the right to an unreasonably low one, arbitrarily fixed by unlimited legislative power. We cannot better close the argument on this point than by a quotation from the very able opinion of the Chancellor of Delaware already referred to.

"That the legislature possesses the general authority to protect the public against extortionate charges and unjust discriminations by carriers exercising a public employment, and that to this power railroad companies, as well as other common carriers, must be held amenable, is not doubted; but the real question still remains, in what mode may such power be constitutionally exercised, at least over corporations. The answer is, that the legislature may by general laws forbid extortion and unjust discrimination on the part of the common carrier, as it may prohibit any other offence against social order or the general welfare. It is not disputed that for the breach of such laws, corporations as well as natural persons may be held liable. Such liability would be enforced by a judicial proceeding, in which the alleged extortionate or unjustly discriminating character of the charges drawn into question would be judicially ascertained. Such remedies against common carriers already exist at common law, and to these as well as to the com-

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mon law, liabilities of common carriers generally, incorporated carriers, as well as natural persons, are subject by the public nature of their employment. Very different, however, from such a mode of regulation by general laws with a liability to judicial remedies, is the attempt by a legislature to prescribe in advance a tariff of charges for carriers; to do which is, in effect, to take out of their hands the management of their own business. This, certainly, can not be done in a case of a corporation. How far the legislature can directly regulate charges by common carriers, not incorporated, is a question not now arising, but the right of a corporation to conduct its own business, to adjust its tariff, (subject to the implied condition that such charges shall not be unreasonable), stands upon a special ground not applicable to an incorporated carrier. For such right, being a part of the corporate franchise granted by charter, is prohibited by the constitution of the United States.

Phil. Wil. & Bal. R. R. vs. Bowen, cited ante.

The distinction between non-corporate and corporate carriers is well marked and defined in the Illinois decisions; while in the warehouse case just referred to, they upheld the right to regulate a natural person exercising a public employment, in *Chicago & Alton R. R. vs. the People* cited *ante*, they denied the same power when attempted to be exercised to a corporation, although in that case as in this, the charter conferred no express power to make just discriminations or receive reasonable compensation, but simply conferred upon the company the right to exercise the vocation of a common carrier.

In this connection, see the language of the charter of the Southern Minnesota R. R. Co., or the amendment thereto, approved February 26th, 1869. "Each one hundred dollars of said capital stock shall be entitled to one vote in matters pertaining to the government and affairs of said company, as *now authorized* by law, or *hereafter provided* by the *by-laws* of *said corporation*.

SEC. 2. That the Board of Directors of said company shall have power to adopt such by-laws as such board may deem necessary, for the purpose of properly carrying out the objects and purposes of this act."

Fourth. Sec. 4, of Art. 10 of the constitution of the State provides as follows: "Lands may be taken for public way for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such lands and the damages arising from the taking of the same, but all corporations being common carriers, enjoying the right of way pursuant to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions or manufactures, on equal and reasonable terms."

It is admitted that the act to regulate the carrying of freights and passengers on all roads in this State, approved March 6th, 1871, p. 61, Gen. Laws, 1871, is in direct viola-

to enjoy the right of way pursuant to its provisions, and not otherwise. A recent case in this court settles this question, and, indeed, as it would seem, goes much further than it is necessary to go here.

Trask vs. Iron Mountain R. R. Co., No. 106, *Oct. Term*, 1873, *Rep.* 1, *Central Law Journal.*
Trask vs. Maguire, 18 *Wal.* 392.

2. But it is said "the rates fixed by the law of 1871 are maximum rates." While the law says it shall be lawful to charge those rates, the constitution says it shall not be, and as the law does not compel the company to obey its behests, but gives it its election, the company may arrange a tariff of its own which will not violate the constitution. That is, the rates that are too low it cannot raise, but if some are disproportionately higher than others when all are too low and below a reasonable compensation, the company has the privilege of reducing these to a proportional standard in order to obey a constitution which the legislature has violated, and thus, by a scale of its own, in some instances lower but never higher than the legislative maximum, avoid unjust discriminations. The act of the legislature has granted certain privileges (poor though they be) to and imposed certain obligations on the railroad company. Now, if the law is unconstitutional in part, if, so far as the privileges it extends are concerned it is void, it surely will not be held good for the purpose of enforcing its obligations. They are incapable of separation. It is clear that the whole law

forms one general scheme, and that the legislative intent can not be carried out save as a whole.

Cooley on Cons. Limitations, 178.

Warren et al. vs. Mayor and Aldermen of Charlestown, 2 *Gray* 99.

3. The section of the constitution referred to imposes an obligation on the companies, and it confers upon them a right. It is not altogether a sword but a shield. They are bound to carry on equal and reasonable terms. The people of the State have an interest in this which the legislature has violated, but the company have an interest also; while it is a duty, it is also a right. It is not merely that they *may* carry on equal and reasonable terms, which would give them a right which the legislature could not control, but they *must* so carry, which includes the permission but adds to it the command and the obligation. What we *must* do, we have the right to do, and if any legislature says that we shall have less than reasonable terms as our maximum compensation, the mandate is void. The company have accepted the act of 1864, knowing of the existence of this constitutional clause, which is incorporated into and become a part of all common carriers' contracts with the State made since its passage. It is as if, in a contract with my servant, I should say, "You shall be bound to work for me for so many months at a price named," and he assents and enters upon the performance of his duties. Can I say in the middle of the service, "I shall pay you henceforth but one-half of the price originally named?"

If this provision may be enforced as well by as against the carrier, what is it but the imbedding of the ancient principles of the common law in the very frame work of the constitution. They shall carry on equal and reasonable terms. Who is to determine what terms are equal and reasonable, the legislature or the courts? That this was a judicial question at the common law, and must continue so under the constitution speaking the language of the common law, is settled by cases already referred to.

Chicago & Alton R. R. Co. vs. The People, 3 *Ch. L. N.* 266.

Com. vs. Props. New Bedford Bridge, 2 *Gray* 339.

Phil. Wil. & Bal. R. R. Co. vs. Bower, 13 *Am. L. R.* 174.

The constitution of the State of Minnesota prescribes the obligation to the public which a railroad corporation such as the present assumes, upon accepting ("enjoying the right") a grant from the state of "the franchise of way for public use," etc.

This obligation upon such corporations is to carry the mineral, agricultural, and other productions or manufactures on equal and *reasonable* terms.

It is apparent that the constitutional obligation to carry on equal and reasonable terms carries along with it a constitutional recognition of the right of *such* carrier to reasonable terms, or in other words a reasonable compensation for the service in such case.

In accepting this provision of the constitution, the car-

rier (unless he has assented to other conditions) assumes the obligation *according to its terms;* that is to say, to carry, etc., upon *receiving* such compensation for the service as shall be *reasonable.*

The constitution does not prescribe that the carrier shall be bound to carry on such terms as the *legislature may prescribe*, but prescribes the rule itself, to wit: that the terms shall be equal and reasonable.

This provision is undoubtedly to be classed among the constitutional *limitations* or *restraints* upon the power of the legislature.

Cooley on Cons. Limitations, 64.

The power of the legislature to grant such a franchise to a corporation is circumscribed by this provision of the constitution, and such a legislative grant must also necessarily be qualified by the condition which the constitution attaches to it, to-wit: that the carrier shall carry, etc., on equal and *reasonable terms;* neither the obligation nor the terms upon which it is assumed or required to be performed by the constitution can be interfered with by the legislature, without the consent of the parties.

Thus, in the case of the Chicago & Alton Railroad Company against The People, before referred to, the Supreme Court of the State of Illinois decided, where the constitution of that State directed the legislature to pass laws to prevent "unjust" discrimination; that this was a *limitation* of the power of the legislature, *restraining* the latter to a prohibition of such discriminations as were "*unjust*," and

that thereby the legislature was disabled from prohibiting discriminations which were not unjust. See syllabus, and also opinion of court in Chicago *Legal News*, March 1, 1873.

The obligation of common carriers to the public, and their right to a *quantum meruit* or reasonable compensation for their service, are clearly defined and recognized by the common law.

In the case of such railroad corporations, the constitution in analogy to the common law, but with paramount authority, both defines the public obligations and the private rights of such carriers.

The present company was organized under a grant of the State of Minnesota in 1864, before cited, since the adoption of the constitution of the State whereby it was invested with the franchises of the original company (which had been acquired by the State) pertaining to the line of road of the new organization.

The franchise of the right of way within the meaning of the constitution, which had previously been granted to the original company under the territorial organization, and had been re-vested in the State, was, by the act of March 4, 1864, *re-granted* to the company, under the constitution, with the right to exercise the power of eminent domain prescribed in the original charter of March 2, 1855, (sections 4 and 5, laws of Minnesota, session of 1855, pages 74 and 75.)

Parcher vs. First Division of the St. Paul & Pacific R. R. Co., 14 *Minn.* 297.

This corporation is therefore within the purview of sec. 4 of article X of the State Constitution.

The act of March 4, 1864, prescribes no limitation or condition as to the terms upon which said company shall carry freight or passengers (except sec. 8, which is as follows:

SEC. 8. That the said Southern Minnesota Railroad Com-"pany shall transport, by all regular trains, all passengers "and freights delivered to the same, by every connecting "line of railroad now or hereafter to be constructed, on the "same terms and at no greater rate than for the time being, "shall be charged for the same service to persons living on "the line of said road. Provided, That any such connect-"ing lines shall be governed by the same rules in transport-ing passengers and freight on their several lines, delivered "by the said Southern Minnesota Railroad,") and leaves said company free to claim its *quantum meruit* for its service as a carrier under the constitution.

This right of the company is inseparable from its charter, and is therefore *part of the contract* existing between this company and the State.

It is the vital part of the contract upon which the company relied in prosecuting a gigantic work and in investing its capital, and certainly within the protection of the Federal Constitution as much as any other contract.

Fifth. The act of Congress making a grant of lands in aid of certain railroads in Minnesota, approved March 3d, 1857, provides—

Sec. 3. That said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Sec. 5. That the United States mail shall be transported over said roads under the direction of the Post-Office Department, at such price as Congress may by law direct, provided, that until such price is fixed by law the Post-Master General shall have the power to determine the same.

Statutes at Large, 34th Cong., 1856-7, *p.* 196.

P. 83, *Edgerton's R. R. Laws.*

The act of the Legislature of Minnesota executing the trust created by said act of Congress and transferring the lands applicable to the line of railroad of the Southern Minnesota Railroad Company to that company, approved July 22, 1857, provides: Sec. 8, chapter 3,—Said railroad shall be and remain a public highway for the use of the Government of the United States, free from any toll or other charge, &c., reciting the language of the act of Congress quoted above, and see the same compact repeated in the land grant of 1867, and act of legislature accepting it, being a grant in aid of the road mentioned in the complaint.

By this inviolable compact between the United States and the State of Minnesota, the Southern Minnesota Railroad was

built, not by the State, but by aid furnished by the national government, subject to certain express conditions, stated above, and expressly assented to by the State—"That it should be and remain a public highway for the transportation of the property, troops of the United States, free of charge." This compact is as irrevocable and as unimpairable by any act of the legislature of the State of Minnesota as if inserted in the federal constitution. The road is as much a federal agency, although in a lesser degree, as the old United States Bank.

The legislature asserts the power to crush it by assailing its vital franchise of collecting a reasonable compensation. The principles upon which the case of McCullough vs. the State of Maryland, 4 *Wheat.*, 415, proceeds, are abundantly, sufficient to protect the company from this legislation. We do not claim that these principles should in the case of a corporation, incorporated by a State, be extended so far as to exempt the property of the company from taxation. This court in *Thompson vs. Pacific Railroad*, 9 *Wallace*, 579, seemed to think that the doctrines of that case might perhaps not illogically be pushed thus far, but in view of the vast amount of property which such a holding would withdraw from the domain of State taxation, it felt it incumbent upon it to stop short of that.

But widely different is this case from that of the Pacific Railroad. Here is a compact between the State and federal government, that in consideration of a munificent grant in aid of this enterprise, it should forever be and remain a fed-

eral agency. The sole means by which its existence can be perpetuated, and it supplied with the power to perform its duties to the general government, is a reasonably remunerative compensation exacted of all others using the road; as well destroy its capital, tear up its rails or burn it station-houses as paralyze its usefulness by destroying its income. In *Railroad Co. vs. Peniston*, 18 *Wallace*, 5, the majority of the court, referring to the case of Thompson vs. Railroad Company, held that there was no sound distinction between a corporation created by the United States, and one existing under the authority of and by charter from the State, and (reviewing the earlier decisions of the court, *McCullough vs. State of Maryland*, and *Osborne vs. Bank of United States.*") that the exemption of federal agencies from State taxation, is dependent not upon the nature of the agents, or upon the mode of their constitution, or upon the fact they are agents, but upon the effect of the tax. Does it deprive them of the power to serve the government as they were intended to serve it, or does it hinder the efficient exercise of that power? A tax upon their *operations* is *a direct obstruction to the exercise of federal power*," and the point of the decision upholding the tax in that case, seems to be, "that it was not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being," but was a mere tax upon the property of the corporation.

Congress has, in the case at bar, made munificent grants

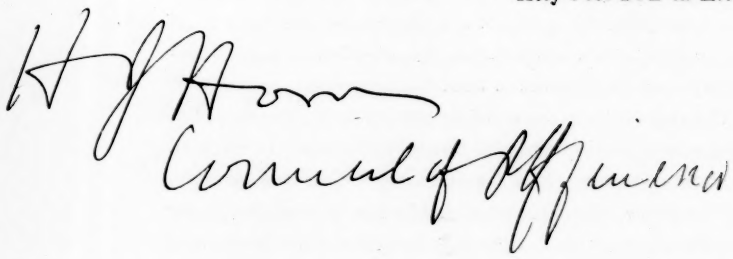
in aid of this highway, has provided for its permanency as a national highway, and the State has assumed the execution of the trust reposed in her by the act of Congress, and expressly assented by its legislation to all the acts by which it was set apart as a national highway, and made free to national commerce. It must be conceded, then, both on principle and the authority of the latest adjudication of this court, that the question is to be treated precisely as if the present was a corporation, the creation of federal authority, and the emanation from federal powers.

The regulation of its tariff strikes not at its property, but aims a fatal blow at the vital franchises in which is involved its very existence It is the same in principle as a tax upon its operations, which the court held to be beyond the power of a State legislature. Even this limitation of the doctrine of the early decision of Ch. J. Marshall and his illustrious associates, seems to have been owing to the very numerous instrumentalities which are quasi federal agencies within the States, and which an extension of the doctrine to all its logical consequences would remove from the domain of State taxation, resulting in the paralysis of the State governments.

But the denial of the right to regulate the compensation of a common carrier is fraught with no such consequences. The common law and the courts furnish to the public as certain and as efficient protection as any fair and just legislation could do. Judges Bradly and Field dissenting, to strengten their position in the case last cited, put the query, as

one to which there could be but one answer, and in which the entire court must agree: "Can the State alter its route, its gauge, its connections, its fare, its franchises, or any part of its charter?"

GORDON E. COLE,
H. J. HORN,
Atty's for Pl'ff in Error.



SUPREME COURT

OF THE

UNITED STATES.

CHARLES MCILRATH, Receiver of the Southern Minnesota Railroad Co.,

Plaintiff in Error,

versus

CHARLES L. COLEMAN,

Defendant in Error.

ABSTRACT OF CASE, AND ARGUMENT OF DEFENDANT IN ERROR.

E. C. PALMER,

Of Counsel for Defendant in Error, with

T. R. HUDDLESTON,

Attorney, St. Paul.

St. Paul Press

SUPREME COURT

OF THE

UNITED STATES.

CHARLES McILRATH, Receiver of the Southern Minnesota Railroad Company,
Plaintiff in error,

versus

CHARLES L. COLEMAN,
Defendant in error.

This is an appeal from a judgment of the United States Circuit Court in the District of Minnesota, recovered by Charles L. Coleman, the defendant in error, against Charles McIlrath, Receiver of the Southern Minnesota Railroad Company, a corporation and common carrier, created under and by virtue of the laws of Minnesota, plaintiff in error, for the sum of $3,000.00 (and costs taxed) alleged to have accrued to said Coleman as settled and liquidated damages under section 24 of the General Laws of 1871 of the State of Minnesota, for three distinct violations of the said statute of

1871, by said plaintiff in error, in charging more that the maximum rates allowed by said statute of 1871, for the carriage of three car loads of lumber from Grand Crossing to Winnebago City, a distance of 167 miles, over their line of railroad in said State.

The three several acts in charging more than the *maximum rates* under said law, for the carriage of the three car loads of lumber, are admitted by the pleadings. The maximum rate under said act being admitted to be $25.95 for each car load, and the actual amount charged for each load admitted to be $40.00.

The said law of 1871 provides (section 8,) that all railroad companies doing business in this State (Minnesota,) are required to transport all passengers and freight in the manner and at the rates *not exceeding* those specified in said act; and if any railroad company or corporation shall fail so to do, or shall violate any of the provisions of said act, such company or corporation shall pay to the party aggrieved by such failure the sum of one thousand dollars, as settled and liquidated damages, to be recovered by the party injured in a civil action, and the costs and disbursements of said action.

The three violations of the statute being admitted, the judgment of the Circuit Court should be affirmed, unless the act of the 1871 of the Legislature of the State of Minnesota impairs the obligation of some contract derived by the railroad company (plaintiff in error) under its charter from various prior legislative acts in violation of the rights of said railroad company under the Constitution of the State of Minnesota, or the Constitution of the United States, or is in some other respect unconstitutional and void.

And the stipulation referred to by the plaintiff in error was entered into after the matter had been presented very

fully by affidavits in a summary manner before his Honor Judge Dillon, of the 9th circuit *in re McIlrath*, 2 *Dillon*, 460. Its design was to avoid delay in having the constitutional questions arising in the case determined in the Supreme Court of the United States, which questions our client who does a large lumber business, and ships over the railroad of the plaintiff in error, is for that reason much interested.

And in presenting the case to the court, we shall endeavor to show as briefly as possible that the act of 1871 did not impair the obligation or vested right of the railroad company (plaintiff in error,) nor was in violation of the Constitution of the United States or the Constitution of the State of Minnesota, but was clearly within the power of the sovereignty for the protection of the people of the State to keep the corporation created by the sovereign within reasonable limits and bounds.

The following is a copy of the act of 1871:

An Act to regulate the carrying of freight and passengers on all railroads in this State. Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. It shall be lawful for any railroad company or corporation doing business in this State from and after the date when this act shall take effect as hereinafter provided, to demand and receive from any person, corporation, company or association desiring the transportation of freight by any such railroad company or corporation over its line or lines of railroad, payment for such transportation at and after the rates following, viz.:

First. On all kinds of grain, potatoes, flour, meal, beef, pork and meats of all kinds, at a rate of six cents per ton per mile, for the first twenty miles or less, that the same may be transported over such line or lines of railroad, and at the

rate of five cents per ton per mile for any distance exceeding twenty and not more than fifty miles, and at the rate of four cents per ton per mile for any distance exceeding fifty and not more than one hundred miles, and at the rate of three and one-half cents per mile for any distance exceeding one hundred miles that the same may be transported; *Provided*, that if the amount of freight desired to be transported at one time shall be less than one car load, such company or corporation may demand and receive an increased compensation therefor at the rate of twenty per cent. above the prices hereinbefore established.

Second. Upon sawed timber, lumber, laths, shingles, coal and salt, at and after the rates following, viz.: at the rate of ten dollars per car load for any distance not exceeding twenty miles, and in addition thereto the following rates, to-wit: at the rate of eighteen cents per car load per mile to any distance beyond twenty miles and not exceeding fifty miles; and at the rate of thirteen cents per car load per mile for any distance beyond fifty miles and not exceeding one hundred miles, and at the rate of eleven cents per car load per mile for any distance beyond one hundred miles; *Provided*, that if the amount of material hereinmentioned desired to be transported at any one time is less than one car load, then such railroad company or corporation may demand and receive compensation in addition to the price above specified not exceeding twenty per cent. above the prices so specified. For the purpose of this section and the section preceding, a car load shall be taken to be twenty thousand pounds weight.

Third. Upon dry goods and other articles of merchandise usually carried by railroads at rates denominated first-class, at rates twenty-five cents in advance of those specified in the first sub-division of this section.

Fourth. Upon sugar in barrels and other articles of merchandise, usually carried by railroads at rates denominated fourth classs, at the same rates specified in the first subdivision of this section.

Fifth. Upon wood at the rate of nine dollars per car load for any distance not exceeding thirty-five miles, and at the rate of eighteen cents per car load per mile for any distance beyond thirty-five miles and not exceeding sixty miles, and at the rate of thirteen cents per car load per mile for any distance beyond sixty miles, provided a car load shall not be less than six cords.

SECTION 2. It shall be lawful for any railroad company or corporation in this State from and after the date when this act shall take effect as hereinafter provided, to demand and receive payment for carrying passengers on any railroad in this State at and after the rate of five cents per mile for each person for the distance such person shall be actually transported by such railroad.

SECTION 3. No railroad company or corporation shall charge any compensation for handling, transferring, or storing any freights transported or to be transported over the line of its railroad, except that upon all freights stored for a longer period than two days after notice given to the consignee to remove the same, such company or corporation may demand and receive for storage exceeding that time such compensation as the same may reasonably be worth. But railroad companies and corporations that shall provide cars at convenient places for loading such freights, may require the consignors to load on the cars timber, lumber, lath, shingles and wood which shall be delivered for transportation.

SECTION 4. It shall be the duty of all railroad companies and corporations in this State to receive all freights of the

kinds mentioned in this act, at any depot or station of such company or corporation whenever brought to such depot for transportation, and to provide suitable places for the storage and reception of such freight at all of its depots and stations. And all railroad companies and corporations shall furnish equal facilities for transporting and shall transport freights of every description in this State to and from warehouses or elevators other than those owned by any such company or corporation at the same rates as from warehouses or elevators owned by such company or corporation, and shall make no discrimination in favor of nor against any warehouse nor elevator.

SECTION 5. Payment for transportation of passengers may be demanded in advance, and payment for freight may be demanded at the place of delivery of such freight after transportation and before delivery.

SECTION 6. That in all cases where freights are offered for transportation over any line of railroads in this State to be carried to and delivered at any point not on the line of said railroad, but upon the line of any other railroad, with which there is a connection by railroad, the said railroad company or corporation where such freight shall be offered for transportation, shall receive and transport the same over its line of railroad to its point of junction with some other connecting line of railroad in the direction in which said freight is desired to be transported by the party offering the same, and any railroad company or corporation with whose line of railroad such junction is made, shall receive such freights and transport the same to the point of delivery, if on its line of railroad, or if not on its line of railroad, then to such point on its line of railroad as the owner or consignee of such freight may direct. And in all cases where freight shall be so offered

for transportation, and in order to reach the point to which the owner or consignee may direct the same to be transported for delivery, it shall be necessary to transport the same over two or more lines of railroad the provisions of this act shall apply to each railroad or corporation over whose line of railroad such freight may be transported to its place of delivery, and shall be transported by each and all of such railroads at and after the rates hereinbefore specified; *Provided*, that in ascertaining the amount of charges to be paid for such transportation, the distance such freight may have been transported over all such railroads shall be charged for only at the rates the same would have been charged for under the provisions of this act had the same been transported the whole of the distance over one only of such lines of railroad. *Provided*, further, that unless the railroad companies or corporations over whose lines of railroad any freight shall be so transported shall agree upon some other manner of dividing the amount of charges collected for such transportation, the same shall be divided between them in manner the following: The whole amount of such charges shall be divided by the whole number of miles such freight shall have been transported by such companies or corporations, and each of such companies or corporations shall be entitled to its proportion of such charges according to the number of miles such freight shall have been transported over each of such lines of railroad.

SECTION 7. That all railroad companies or corporations doing business in this State, shall transport all freights offered for transportation, within a reasonable time, and in the order of the reception of the same for carriage. And if any railroad company or corporation shall transport freights of any description for any person or persons, corporation, company or association, at rates less than are provided in this

act, then such company or corporation shall thereafter transport freights of the same description over its line of railroad for all other persons at the same reduced rates during the time such discrimination is in force.

SECTION 8. *That all lines of railroad in this State are hereby declared to be public highways, and all persons shall have and enjoy the right of passage over the same in the passenger cars running and to be run thereon, and the right to have freight of all kinds transported upon and over any and all of such railroads in the cars running and to be run thereon,* AT RATES OF CHARGES NOT EXCEEDING THOSE SPECIFIED IN THIS ACT. *And each and all railroad companies doing business in this State are hereby required to transport all passengers and freights in the manner and* AT RATES NOT EXCEEDING THOSE SPECIFIED IN THIS ACT; *and if any railroad company or corporation shall fail so to do or shall violate any of the provisions of this act, such company or corporation shall pay to the party aggrieved by such failure the sum of one thousand dollars as settled and liquidated damages, to be recovered by the party injured, in a civil action, and the costs and disbursements of such action.*

SECTION 9. *The rates established by this act for the transportation of freight and passengers are hereby declared to be* THE MAXIMUM OF REASONABLE RATES. If any railroad company or corporation shall demand or receive higher rates for such transportation than are established by this act, it shall be deemed to have misused its powers and violated the terms on which its charter and franchises were granted, and it is hereby made the duty of the Attorney General of this State, upon receiving satisfactory evidence of such misuse, to cause proceedings to be instituted and prosecuted against such railroad company or corporation, in the proper court, for the forfeiture of the charter and franchises of said railroad company or corpora-

tion, or for the collection of a fine not exceeding one thousand dollars for each violation of the provisions of this act, at the discretion of the court before which the case shall be tried.

SECTION 10. This act shall take effect and be in force on and after the first day of May, A. D. one thousand eight hundred and seventy-one.

SYNOPSIS OF STATUTES INCORPORATING DEFENDANT.

ORIGINAL CHARTER. "A bill for an act to incorporate the Root River Valley and Southern Minnesota Railroad Company," approved March 2, 1855. Session Laws Minn., 1855, p. 73.

Section 1 designates the names of the corporators, and provides further that "all such persons as shall hereafter become stockholders in the company incorporated shall be and are made a body politic and corporate by the name of the Root River Valley and Southern Minnesota Railroad Company," &c.

Section 2 reads, the said corporation is hereby authorized and empowered and it is hereby declared that the objects and purposes thereof are to survey, locate, construct, maintain, use, and operate, and at their pleasure to alter the line thereof without changing the eastern terminus, a railroad with one or more tracks or lines of rails from the village of Hokah, in the county of Houston, Territory of Minnesota, westwardly by the most feasible route to some point between the south bend of the Minnesota River and the southern line of the Territory of Minnesota, thence westward by the most direct and practicable route to the great bend of the Missouri River,

with the privilege of a branch starting from Hokah and running up the west bank of the Mississippi River by the way of Target Lake to Eagle Bluffs, in Winona county, in the Territory of Minnesota, together with all necessary and proper stations, depots, turnouts, engines, cars and other appurtenances and furniture of a railroad; and the said company is also authorized and empowered to extend the line of their railroad to such point as they may deem proper on the line which may be adopted and established by the Lake Superior, Puget's Sound & Pacific Railroad Company; and the said company is also authorized and empowered to excavate, construct and complete a steamboat canal from the main channel of the Mississippi River through Target Lake to the most feasible point on Root River, in section twenty-eight in township one hundred and four north, range number four west, of the fifth principal meridian, and to remove all obstructions to the free navigation of Root River from said point to the village of Hokah; and said company may build, construct and operate boats for the conveyance of passengers and freight to and from the eastern terminous of said railroad.

Section 3 fixes the amount of the capital stock, the number and amount of shares, makes it transferable in such manner as the corporation by its regulations or by-laws shall prescribe, that no share of stock shall be transferred while there shall be any installment assessed thereon unpaid, and that the directors may with the consent of a majority of the holders of the stock increase the capital to such sum as may be necessary, not exceeding twenty millions of dollars.

Section 4 grants the right of way for the purposes of the railroad and canal, land not exceeding 200 feet in width throughout their entire length, and to enter upon, take possession of and use any lands, streams, timber and material

of any and every kind for the purposes of the survey and location of said railroad and canal, of all stations, depots, turnouts, and other appurtenances thereto, and for the purpose of constructing said railroad and canal, all bridges, depots, stations, turnouts and other things necessary, proper or convenient for the same, and the full use and protection of all of their appendages or appurtenances.

All such lands within the limits of the line of said road and canal which may now belong to this Territory or hereafter acquired thereby or by the STATE in which the said line may be, is hereby granted to the said corporation for such purpose, *to be by them held and possessed so long as the same shall be and for such purposes and no longer, &c.*

Section 5 gives the corporation right to hold additional lands for the purposes for which they were incorporated, and provides that unless the same is purchased or voluntarily given by the owner, full and proper compensation therefor shall be made by the corporation to the owner, and provides the manner in which the compensation shall be ascertained and determined, &c.

Section 6 provides what shall be the duties of courts in relation to appointing commissioners to ascertain the amount of damages to owners of land taken by corporations, &c.

Section 7 provides for appeal from report of commissioners.

Section 8 provides when corporation shall meet to determine whether they will accept or reject this charter, &c.

Section 9 provides for the board of directors to make assessments on stock.

Section 10 provides for the time within which twenty-five miles of said railroad shall be completed and canal located, and to complete one track from Hokah to the Blue Earth River, &c., within ten years.

Section 11 authorizes corporation to construct the road and necessary bridges across public highways and navigable streams, provided it is done as not to obstruct or impede the navigation of any navigable stream, &c.

Section 12 provides what kind of rail shall be used.

Section 13 provides for punishing offenders in obstructing the road, and declares the doing of certain things by any person a misdemeanor, and in case of death produced by any willful or malicious obstruction of road, person deemed guilty of murder in first degree.

Section 14 provides that *conductors, baggage masters or agents of said company shall wear a badge* indicating his office, and that *no conductor or collector shall demand or be entitled to receive any fare or toll* from any freight or passenger, or exercise any control or direction in his station, or to be authorized or allowed to interfere with any passenger, baggage or freight *without wearing such badge.*

Section 15 provides that every locomotive on said railroad shall be furnished with a good and sufficient alarm bell or whistle which shall be sounded at least 80 rods distant from every highway crossing while the engine shall be passing over said road, and for every violation enacts a penalty, &c.

Section 16 provides "*this act is declared to be a public act, and* MAY BE AMENDED BY ANY SUBSEQUENT LEGISLATIVE ASSEMBLY IN ANY MANNER."

Section 17 provides "this act shall take effect immediately after its passage."

Section 18, 19, 20, 21, 22 and 23, provide for establishing county seat of Fillmore county, organization of Wright county, &c., and does not seem to have anything to do with the corporate powers of defendant.

This act is approved March 2d, 1855.

The next act relating to the defendant is entitled "An act to amend an act to incorporate the Root River Valley and Southern Minnesota Railroad Company," and was approved March 1st, 1856.

Section one provides that section two of this said act be amended, adding after the words "Territory of Minnesota" in the twelfth line, the following: "With the privilege of a branch railroad starting from Hokah and running by the most direct and feasible route to some part in the village of Brownsville, in the county of Houston, in the Territory of Minnesota."

Section 2 provides that section sixteen of the act of which this is amendatory, be amended to read as follows, to-wit: "*This act is hereby declared a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation.*"

The next act relating to defendant's charter was approved February 27, 1857, entitled "An act to amend an act to incorporate the Root River Valley and Southern Minnesota Railroad Company."

Section 1. That all of section two before the words "together with all necessary and proper stations" in line thirteen of said section, as printed in the session laws of 1855, of an act entitled an act to incorporate the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, A. D. 1855, be and the same is hereby amended so as to read as follows, viz.:

The said corporation is hereby authorized and empowered, and it is hereby declared that the objects and purposes thereof are to survey, locate, construct, maintain, use and operate, and at their pleasure to alter the line thereof without changing the eastern terminus, a railroad with one or more tracks

or lines of rail from the village of Hokah, in the county of Houston and Territory of Minnesota, westwardly by the most feasible and practicable route to some point between the southern line of the Territory and the point where the township line between township 110 and township 111 crosses the Minnesota River; thence westwardly by the most direct and practicable route to the great bend of the Missouri River, with the privilege of a track starting from Hokah and running up the west bank of the Mississippi River by the way of Target Lake to Eagle Bluffs, in Winona county, in the Territory of Minnesota; and also with the privilege of a branch railroad from Hokah and running by the most feasible route to some point in the village of Brownsville, in the county of Houston, and Territory of Minnesota; also with the privilege of a branch railroad with one or more tracks or lines of rail from some point on the main road east of range 12, west of the principal meridian, westwardly, through the counties of Mower, Freeborn and Faribault to the west line of the Territory.

The said corporation is hereby authorized and empowered to receive subscriptions to the capital stock of said company, in bonds and mortgages on real estate, and also in real estate and par stocks at such valuation and appraisement as shall be determined by the directors of said company.

The next act relating to defendant was approved May 22d, 1857, and is entitled "An act to execute the trusts created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in

said State, and granting certain lands to railroad companies therein named.'" Laws Minn. 1857, chap. 1.

The act of Congress referred to in the title was approved March 3, 1857, and was a grant of lands to the Territory of Minnesota and the State of Alabama in trust, to be used in aiding the construction of various railroads. The Root River Valley and Southern Minnesota was one.

Section 3 of the act of Congress contains the following:

"And the said railroads and branches shall be and remain public highways, for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

Section 5 reads: "And be it further enacted that the United States' mail shall be transported over said road and its branches under the direction of the post office department, at such price as Congress may by law direct; *Provided*, that until such price is paid by law, the Postmaster General shall have the power to determine the same." 11 *U. S. Statutes at large, p.* 195.

Chap. 3 of the act of the legislature of which the title is given above, only affects the defendant's road—the remainder of act relating to other companies wholly.

Section 1 of that chapter renews the powers granted *by the original charter and amendments thereto.*

Section 2 gives them further power to construct and build a road from St. Paul and St. Anthony via Minneapolis to southern boundary of the Territory of Minnesota, &c.

Section 3 grants to the company the lands received under the act of Congress.

Section 4 provides within what time road shall be completed, &c.

Section 5 provides for building a branch road from at or

near Hokah to Brownsville, with proviso that nothing shall conflict with act of Congress, and *they are to enjoy the same rights, privileges, franchises, &c., as are granted to said company by their act of incorporation.*

Section 7 provides that all the interest, present and prospective, of the Territory and future State in or to any and all the lands granted by Congress to the Territory of Minnesota for the purpose of aiding in the construction of the road, &c., are hereby vested in said railroad companies, &c.

Section 8 provides for location of route, &c., and that the same shall be a public highway for the use of the Government of the United States free of toll, &c.

Section 9 provides that the lands shall be exempt from taxation until sold and conveyed by companies, &c., and that after a certain time the company shall pay into the treasury of the Territory or State in lieu of all tax 3 per cent. per annum on their gross earnings, &c.

There are other sections not deemed material to particularize.

The next amendment to said act of incorporation was an act entitled "A bill to change the name of the Root River Valley and Southern Minnesota Railroad Company, approved May 23d, 1857.

Section 1 provides that the corporate name of the Root River Valley and Southern Minnesota Railroad Company shall hereafter be the Southern Minnesota Railroad Company, and by that name shall be known and called in all its corporate acts and dealings.

Sec. 2. That section 2 of an act to incorporate the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, 1855, be amended by striking out the

words " Eagle Bluffs in Winona county," and insert in lieu thereof the words " La Crescent in Houston county."

Afterwards, and in the year 1858, by virtue of the amendment of April 15, 1858, to the Constitution of the State, the State delivered certain of its bonds to the company, and as security for their payment by the latter, took a mortgage of all the company's property, lands and franchises.

See act entitled an act concerning land grant railroads, p. 178, ~~175~~, Laws 1858, providing for sale of lands of railroad companies in default of paying interest on the bonds, &c.

Upon breach of condition in not providing for and paying interest on bonds, &c., the mortgage was in the year 1860, foreclosed by the State. Under such foreclosure the State purchased all the interest covered by the mortgage.

Subsequently, on March 4th, 1864, an act was passed and approved entitled " An act to facilitate the construction of the Southern Minnesota Railroad, and to amend and continue certain acts in relation thereto."

Section 1 provides that all the rights, benefits, privileges, property, franchises and interests of the Southern Minnesota Railroad Company acquired by the State of Minnesota by virtue of any acts, deeds, sale, foreclosure, agreement or thing by the said company hereinbefore done or suffered, or by reason of any forfeiture or by virtue of any law of the State, or any forfeiture by the Governor of the State acting for and in behalf of the State, or by reason of a sale of the same or any part thereof by the Governor of the State of Minnesota, and bid in and purchased by the Governor of the State of Minnesota for the benefit of the State of Minnesota, pertaining to the line of road from La Crescent up the Root

River valley to a point of junction with the Transit (now Winona and St. Peter,) at Rochester, and also pertaining to the line of road and branches prescribed in an act entitled An Act to incorporate the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, A. D. 1855, and the several acts amendatory thereof. Provided, that the branch mentioned in said act running through the southern tier of counties, shall commence at or east of range ten, and all the lands, interests, rights, powers and privileges granted to and conferred upon the Territory of Minnesota in and by virtue of an act of Congrees approved March 3, A. D. 1857, entitled "An Act making a grant of lands to the Territory of Minnesota in alternate sections to aid in the construction of a certain railroad in said Terrority, and granting lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," applicable to the said road or line of the said Southern Minnesota Railroad hereinbefore specified, are hereby disposed of and conferred to and upon the said Southern Minnesota Railroad Company, subject to the provisions of the act of Congress aforesaid, be and the same are hereby held in trust to be continued, granted and transferred for the purpose and on the terms and conditions hereinafter in this act provided, free and clear of all claims and liens thereon, and free from all liens and claims of the State of Minnesota against the same, *except such as are retained by the provisions of this act;* and all the rights, privileges, franchises, lands, property and interest granted by the Territory of Minnesota to the Root River Valley and Southern Minnesota Railroad Company, or Southern Minnesota Railroad Company, by the several acts of the Legislature of said Territory, the one entitled "An Act to incorporate the Root River Valley and Southern

Minnesota Railroad Company, approved March 2d, A. D. 1855," and of the several acts amendatory thereof, and an act entitled "An Act to execute the trust created by the act of Congress entitled An Act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said State, and granting certain lands to railroad companies therein named, approved May 22d, A. D. 1857, pertaining to the line of road from La Crescent up the Root River valley to a point of junction with the Transit (now Winona and St. Peter,) at Rochester, and pertaining to the line of roads and branches prescribed in said act of incorporation of the Root River Valley and Southern Minnesota Railroad Company, approved March 2d, A. D. 1855," and the several acts amendatory thereof, are hereby granted and transferred to T. B. Stoddard, C. D. Sherwood, Luke Miller, Daniel Cameron, Clark W. Thompson, William D. Hurlbert, Hiram Walker, William Meighen, B. D. Sprague, H. W. Holley, Thomas McRoberts and William Moran, and their associates and successors, with all the immunities, rights, property, benefits and privileges which the said Root River Valley and Southern Minnesota Railroad Company, or Southern Minnesota Railroad Company, had or might or could have by reason of the passage of the said act, to said road or lands free and clear of all claims and liens thereon, and free from all liens and claims of the State of Minnesota against the same, except such as are retained by the provisions of this act. For the purpose of carrying out and effecting the objects of this act, the Southern Minnesota Railroad Company and their successors and assigns *shall have and be possessed of all the powers, immunities, franchises and privileges contained in and provided for in the said two acts referred to in this section, and be subject to all the conditions*

and provisions of the said act excepting as altered or changed by this act.

Section 2 provides who shall constitute a board of directors, and directs election to be held annually.

Section 3 provides who may call first meeting of board.

Section 4 provides when company shall acquire title to roadbed, and the duty of the Governor on completion of every 20 consecutive miles of said railroad to convey title of lands to company, &c.

Section 5 provides that when road is fully completed and land granted to company by the provisions of this act, that the lands shall be exempt from all assessments and from all taxation whatever, until the same shall be sold by the company, and in consideration of an annual payment of a per centum, all other property, estate and effects of said corporation shall be forever exempt. Provides what the per centum shall be, when to be paid, how it shall be arrived at, and penalty, &c.

Section 6 provides for the cancellation of bonds issued by railroad company to the State of Minnesota when ten miles of said railroad is fully completed.

Section 7 provides upon what conditions the rights and privileges, &c., are assigned and granted to said company.

Section 8 provides regulations for transportation of passengers and freight with connecting lines "now or hereafter constructed," to be transported on the same terms and at no greater rate than shall be charged for the same service to persons living on the line of said Southern Minnesota Railroad Company.

Section 9 provides that company may construct telegraph lines.

Section 10 provides *that all additional aid granted by Congress shall become vested in said company.*

Section 11 provides that company may issue stock, &c.

Section 12 provides that company may consolidate its line of road.

Section 13 repeals section 12 of act to incorporate company, approved March 2d, 1855.

Section 14 provides that company shall construct cattle guards and fence.

The next act, relating to the said railroad company was approved Feb. 16, 1865, entitled An Act to aid the Southern Minnesota Railroad Company in the construction of their branch road westwardly through Southern Minnesota.

Section 1 provides that for the purpose of aiding the Southern Minnesota Railroad Company in the construction of its branch railroad, &c., all the swamp lands that are or may hereafter become vested in the State of Minnesota, lying and being in sections designated by odd numbers, within the Root River land district, and also all the swamp land in the sections designated by odd numbers lying north of said Root River land district west of range 29 and south of Minnesota river, as soon as twenty continuous miles of said branch is located and completed, the company shall have the right to and may select from the swamp lands set apart, equal to but not to exceed four full sections per mile, on certain conditions, and providing said company shall construct their branch road from the village of Hokah by the way of Target Lake to La Crescent, according to the provisions of the act of Congress of March 3, 1857, granting lands to the territory of Minnesota for railroad purposes; and providing that if said company shall not, within five years, construct and equip for business, with the cars running thereon, at least 20 miles, and the residue within seven years, all lands granted to be forfeited to the State, &c.

The next act relating to the defendant was an act of Congress approved July 4th, 1866, entitled "An Act making an additional grant of lands to the State of Minnesota in alternate sections, to aid in the construction of railroads in said State."

It provides in substance, that 5 alternate sections of land designated by odd sections, on each side of the road is granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from Houston, in the county of Houston, through the counties of Fillmore, Freeborn and Faribault, to the western boundary of the state, *as the Legislature of the State may determine*, lands to be subject to the disposal of the State of Minnesota, for the purposes aforesaid and no other, and the said railroad shall be and remain public highway for the use of the Government of the United States, free of toll or other charges upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge and expense in all respects of the company, or corporation, or their successors, or assigns having or receiving the benefit of the land grant. Road to be completed within 10 years, or lands revert to the United States, &c. 14 U. S. Statutes at large, 87 and 88.

The next act relating to defendant is an act of the Legislature of the State of Minnesota, approved February 25th, 1867, entitled "An act to accept a grant and an execution of a trust made and created in and by an act of Congress entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,'" approved July 4th, 1866.

Section 1. The State assumes the Congressional land grant.

Section 2 vests the grant in the Southern Minnesota Railroad Company, for the purposes named, with the following proviso: "*Provided, That the Legislature shall have the right to fix and regulate from time to time the rates of freight and passenger tariffs on said railway, or any branch or division thereof.*"

Section 3 states the route. Section 4, the duty of the Governor. Section 5, when road shall be completed. Section 6, the penalty for non-completion of the road. Section 7, the duty of board of directors. Section 8, that "this act shall take effect and be in force from and after its passage."

The next act relating to the defendant is an act approved March 7th, 1867, amending section 2 of the last named act, so that the same reads identical as the other section, *except it leaves out* the proviso giving the Legislature the right to fix and regulate the rates of freight and passenger tariffs.

The next act relating to defendant is an act approved March 4, 1868, amending section 3, of the last mentioned act, in regard to the route, and provides when road shall be completed.

The next act relating to defendant authorizes them to build a bridge across the Mississippi River. Special Laws of Minn. 1868, pp. 2 and 3.

The next act relating to defendant is an act approved February 26, 1869, entitled "An act relating to the stock of the Southern Minnesota Railroad Company."

Section 1 provides that stock shall be divided into shares—for what purpose and denomination. Section 2 gives power

to directors of company to adopt such by-laws as such board may deem necessary for that purpose; and section 3 provides that the act shall be in force from and after its passage.

The next act relating to the defendant is entitled "An act to authorize the Southern Minnesota Railroad Company to construct a branch railroad from Lanesboro to the southern boundry of the State," approved March 2d, 1870.

The act in substance authorizes the defendant to construct and operate a branch of railroad from Lanesboro to the southern line of the State, &c., and shall have and possess in respect to the branch all powers, franchises, privileges and rights, right of way, &c., that it has or may exercise on main line, &c., and to be completed by 1875.

The next was an act approved March 16, 1871, entitled "An act to authorize the Southern Minnesota Railroad Company to construct and operate additional branches of their road."

The next and last was an act approved February 29, 1872, entitled An Act to authorize the Southern Minnesota Railroad Company to construct and operate a branch from some situable point on its main line in Faribault county by way of Blue Earth City to the Iowa State line.

The rights and privileges granted by these two last acts are all the powers, franchises, rights and immunities, right of way and privileges that it has or may exercise on the main line of its road.

Sections 4, 5, 6, 7 and 8 of *original charter* 1855, heretofore briefly given, are as follows:

Sec. 4. The said corporation shall have the right of way upon and may appropriate to its own use and control for the purposes of the said railroad and canal, their appurtenances, land not exceeding two hundred feet in width, throughout their entire length, and may by its engineers, agents and contractors, enter upon, take possession of, and use all and singular any lands, streams, timber and materials of any and every kind, for the purposes of making the survey and location of said railroad and canal, of all stations, depots, turnouts and other appurtenances thereto, and for the purpose of constructing the said railroad and canal, all bridges, depots, stations, turnouts and other things necessary, proper or convenient for the same, and the full use and protection of, and of all their appendages or appurtenances. All such lands within the limits of the line of said railroad and canal which may now belong to this Territory, or hereafter be acquired thereby, or by the State in which the said line may be, is hereby granted to the said corporation for such purposes, to be by them held and possessed so long as the same shall be used for such purposes, and no longer; *Provided*, That in case any of the lands which have been reserved or shall hereafter be reserved or granted for the use of schools, shall be included within the limits of the said line, the said corporation shall pay therefor such sum, not less than one dollar and twenty-five cents per acre, as the Governor of the Territory or such State shall fix, which sum shall he paid to such Governor, and shall belong to the school fund of such Territory or State.

Sec. 5. The said corporation may take and hold for the said purposes or any of them, such additional lands as may be requisite or convenient therefor; but unless such lands taken

by the said corporation for any of said purposes, shall be purchased of, or voluntarily given by the owner or owners thereof, full and proper compensation therefor shall be made by the said corporation to the owner or owners thereof, which compensation shall be ascertained and determined in the manner following:

The said corporation may present to a court in the county in which the lands or real estate proposed to be taken shall be situated, having jurisdiction competent to entertain, adjudicate and determine questions of title to real estate; a petition signed by some authorized agent or attorney thereof, describing with reasonable certainty and accuracy, by map, plat, survey or otherwise, the lands or real estate so proposed or required to be taken, and setting forth the name of each and every owner, incumbrancer, or other person interested in the same or any part thereof, so far as the same can be ascertained by the legal records affecting the same, and by view of the premises or other inquiry touching the occupation thereof, and praying the appointing of three competent disinterested persons, as commissioners to ascertain and determine the compensation to be made to the said owner or owners respectively, and to all tenants, incumbrancers and others interested, for the taking or injuriously affecting such land or real estate. A copy of such petition with a notice of the time and place when and where the same will be presented to the court, shall be served on each and every person named therein as owner, incumbrancer, tenant or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering such copy of the petition and notice to each of the persons so named therein, if a resident of this Territory, or in case of the absence of such person, by leaving

such copy of petition and notice at his or her usual place of abode with some person of sufficient age and understanding to comprehend the object thereof, which shall be communicated to such person, with a request to deliver the same to the individual for whom it is thus left at the earliest opportunity. In case there shall be any persons named in any such petition who are not residents of this Territory, and upon whom service cannot be made in the manner above prescribed, a notice, stating briefly the objects of the petition, a description of the lands proposed to be taken, and the time and place of the presenting the petition to the court, and directed to such person or persons, shall be published in the newspaper published nearest the location of such lands, and in a newspaper published at the seat of government of the Territory in which the lands shall be situate, once in each week for six consecutive weeks previous to the time designated for presenting such petition. The court to whom such petition shall be presented shall not make any order for the appointment of commissioners to ascertain and determine the compensation to be made to any owner or person interested who shall not appear in person or by attorney or counsel, except upon proof by affidavit and to the satisfaction of the court, of the service of the petition and notice in the manner hereinbefore prescribed; but may do so upon the appearance of the party or parties, or upon such proof of service in the absence of the party or parties. The court may, upon the application of the said corporation or of any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interests may be affected thereby.

Sec. 6. When the court shall have proof satisfactory that all parties interested in any parcel of land have been duly

served with the petition and notice in the manner herein prescribed, and of the nature and extent of the interest or estate of each and every party in the same, the court may make an order to be recorded in the minutes thereof, appointing three disinterested, competent persons commissioners to ascertain and determine the amount to be paid by the said corporation to each of such persons as compensation for his interest or estate in such parcel or parcels of land, and specifying the time and place of the first meeting of such commissioners. The said corporation shall without delay procure and deliver to each of such commissioners a copy of such order. Before the said commissioners shall enter upon the discharge of their duties they shall respectively take and subscribe an oath that they will faithfully and impartially, and without fear, favor, reward or the hope or promise of reward, discharge their duties as commissioners to ascertain and determine the compensation to be paid by the Root River and Southern Minnesota Railroad Company to (here insert the names of the persons whose property is to be appraised) for lands or interest in lands to be taken for the use of said company. Such oath may be taken before any officer authorized by law to administer oaths. Whenever the place of any commissioner shall become vacant, the court may upon such notice to the parties as he may prescribe, and by like order supply the place by the appointment of an other person as such commissioner, who shall be in like manner served with a copy of the order appointing him, and take the like oath. The commissioners shall meet at the time and place specified in the order appointing them, and in the order supplying any vacancy in such commission. When met and all present they may proceed to the hearing of the proofs and allegations of the parties present, or reasonably notified by the company to

be present, and authorized to administer oaths to witnesses before them; and before making any report they shall, if requested by any party interested or by either of their number, view the premises for which compensation is to be made, and the amount of which they are to determine. The commissioners may, as the exigency of any case or the convenience of the parties or themselves may require, adjourn from time to time and to such places as may in their judgment be most conducive to the purposes of their investigations. No proceedings shall be had by the said commissioners unless all of them be present, except to adjourn, but any and every question submitted to them may be decided by a majority, and a report by a majority shall be valid. The said commissioners shall keep minutes in writing of all their proceedings, in which they shall enter the time and place of their meetings and adjournments, the names of parties appearing before them in person or by attorney, the substance of the testimony of witnesses sworn and examined before them, and all disputed questions which shall be submitted to them, and their decisions thereon. In estimating damages or compensations to be paid to any claimants to lands or interests in lands so proposed to be taken, the said commissioners shall take into consideration the benefits to accrue to the claimant by the construction of the said railroad, and allow such benefits by way of recroupment against the damages which such claimant may sustain thereby, and report only the balance of damages which shall remain after applying such benefits in recroupment thereof, but no balance shall be in any case reported in favor of the company. They shall make and sign a report which shall contain a description by metes and bounds, survey, map or plat, of each separate parcel of land proposed to be taken by the said company for its use, and the compensa-

tion for which they shall ascertain and determine, and the amount (if anything) to be paid by said company to each person whose interests are to be affected thereby. They shall as soon as their report shall be made, attach thereto their minutes and oaths of office, and file the same in the office of the clerk of the court appointing the said commissioners, and notify the parties interested in such report that the same is made and filed. In case the said company or any person interested in such report shall deem the same unjust in any matter affecting the amount of the compensation to be paid, the company or such party may appeal therefrom, any time within twenty days after the service of notice of filing of said report. The party appealing shall file a notice of such appeal with the clerk of the court with whom the report shall have been filed, stating the grounds of the appeal, and serve a copy thereof on the opposite party within the time above prescribed for taking appeal, and by giving a bond in such penalty as the judge of the same court shall prescribe, conditioned to prosecute the appeal without unnecessary delay, to abide the order the court may make on such appeal, and to pay the costs of the appeal if he shall fail to sustain the grounds of error or injustice prescribed in his notice of appeal. Upon the filing of the notice and bond for appeal with proof by affidavit of the service of such appeal as above prescribed, all further proceedings on the report shall be stayed until the further order of the court, and the cause upon such appeal shall be entered, proceeded in and determined in the same manner as cases on appeal from courts of justice of the peace; and in case the appeal shall involve the determination of any question of fact, the same shall be tried by a jury, unless the jury shall be waived by both parties. The report of the commissioners shall be final and conclusive

unless appealed from in the manner above prescribed. Whenever the company shall take an appeal from any report of commissioners, such appeal shall not stay the work on the said road and canal or other structure on the premises or lands involved in the appeal, provided the company shall deposit in court the amount awarded or assessed by the report or part or portion of the report appealed from, to abide the order to be made by the court on the appeal.

Sec. 7. An appeal from any report or part or portion of a report of commissioners by or on the part of any person interested in any parcel of land or real estate proposed to be taken by the company, shall stay all work on the road or other structure on the premises in question unless the company shall deposit in court the amount of money claimed by such appellant before the commissioners, to abide the order of the court on the said appeal. Whenever any report or part of report of commissioners shall have become final, and whenever any appeal from such a report or part of report shall have finally determined, the said corporation shall, upon the payment to each party interested, the sum thereby determined to be due to him or her as compensation for property taken, or deposit the same in the court for his or her use, become invested, seized of the title to the lands or real estate for which such payment or deposit shall have been made, and be entitled to the full, free and perfect use and occupation of the same for the purposes aforesaid, which are, for all the objects of this act, hereby declared to the public purposes. The said commissioners shall be entitled to reserve three dollars per day for their services, and their compensation and all the fees of officers previous to and including the filing of the report of the commissioners, shall be paid by the said company. In case the title thus acquired to any lands by

the said company for their use in the manner thereinbefore mentioned or otherwise, shall prove defective, they are hereby authorized to take the proceedings prescribed in this section to procure the title from the real owner.

Sec. 8. The corporators named in the first section of this act shall meet at Hokah aforesaid on the first Wednesday of July next, to determine whether they will accept or reject this charter. If a majority thereof shall not then and there meet, he or they who may be present, may adjourn the meeting to some future day, and to such place as he or they may deem proper, and notify the absentees of such adjournment; and the same proceedings may be had at any meeting until a majority of such persons shall be present. Whenever a majority of such persons shall have met, they shall by resolution determine to accept or reject this charter and notify the secretary of the territory thereof. If they shall determine to accept this charter, they shall appoint three or more of their number and such other person or persons as they may deem proper, as agents or commissioners, to receive subscriptions to the stock of this corporation and direct the times and places when and where the books for receiving such subscriptions will be opened, and such books may be opened by different agents or commissioners, at different places, at the same time. Every person who shall subscribe for any stock of this corporation shall at the time of subscribing pay to the agent or commissioners two per cent. on the amount of stock so subscribed.

The act of 1858, under which the mortgage and foreclosure was made, only briefly referred to, is as follows:

An Act concerning Land Grant Railroads.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Each and every railroad company entitled to, and accepting the loan of State credit authorized by Section X, of Article 9 of the Constitution, shall make due provision for the punctual payment of the interest, and the final redemption of the Minnesota Railroad Bonds, issued to such company by the State, and to this end, every such railroad company shall provide and arrange that semi-annual payments of interest and final payments of the principal of the first mortgage bonds of any such railroad company, which may be or shall have been transferred to this State on the roads, lands, and franchises of any such company, corresponding to the State bonds to such company issued, shall mature and be payable at least sixty days before the maturity of the principal or interest of the Minnesota State Railroad Bonds issued, and delivered or to be issued, and delivered to such company; and the interest and principal of said railroad bonds which may have been transferred to the State, shall be paid at the maturity thereof to the Treasurer of the State, together with such amount as may be necessary to pay all exchanges or expenses in payment of the ensuing installments or interest or principal of the Minnesota State Railroad Bonds, issued for the benefit or use of such railroad company. And all such railroad companies claiming or receiving State aid, shall further make due provision that all necessary expenses or charges incurred to carry out the provisions of this enactment, and the provisions of the said Section ten, Article nine of the Constitution authorizing and having reference to a loan of State credit to railroads, shall be borne, and paid *pro rata*, by such railroad companies as

may receive the benefits thereof, and shall not be chargeable to the State.

Sec. 2. Whenever any default shall occur in the payment of interest or principal of the railroad bonds transferred to the State, so that no provision shall be made by the said railroad companies as aforesaid, for the ensuing payment of the interest or principal of the Minnesota State Railroad Bonds, sixty days before the maturity of any installment of interest or final redemption of said State railroad bonds as herein provided, the Governor shall immediately proceed to provide for such payment or payments, and to indemnify the State for such payment or payments, or responsibility, by sale of a sufficient amount of the bonds of the defaulting company, or by sale of the lands pledged, or foreclosure of the mortgage or deed of trust of such defaulting company, or by all or any such means of indemnification in the manner herein provided.

Sec. 3. The Governor may on such default, immediately advertise for thirty days in three newspapers published in the city of New York, and in one newspaper published at the seat of government of this State, that a sufficient amount of first mortgage bonds of such defaulting company shall be sold on the fortieth day after such default, in the city of New York, to the highest bidder for cash, and such sale of bonds shall be made accordingly, and the proceeds thereof shall be returned to the Treasury to indemnify the State for such default, together with all costs, charges and damages growing out of such default and sale.

Sec. 4. In case of a sale of lands to be made under and to provide for the default of any such company as aforesaid, the Governor may advertise and sell the same in such parcels, and at such times, as shall be deemed most expedient, and all such sales or conveyances shall be made by the Gov-

ernor and Secretary of State, and shall be absolute conveyances of the title in fee as far as the same may have been invested in any such company, or in the State, and without any redemption or right of redemption in any company, or subsequent creditor, person or persons whomsoever, but no sale of bonds or lands shall take place if the defaulting company shall make payment of all principal and interest then due, and all expenses incurred by the State prior to the day of sale of any such railroad bonds or lands, but this provision shall not be so construed as to prevent the Governor and Secretary of State, until such payment by the defaulting company, from making sales and conveyances of any parcels of lands, as aforesaid, without the consent or assistance of the defaulting company, whenever default shall occur in the provision by such company as herein required, for any ensuing payment of interest or principal of the Minnesota State Railroad Bonds issued to such company.

Sec. 5. All foreclosures of the mortgage or deed of trust of any defaulting company making such default, in the payment of interest or principal of the bonds of such company and for which default a foreclosure of the mortgage or deed of trust of such company may be required, or demanded, shall be made only for and on account of the default occurring, and all such foreclosure shall be by public sale of all the properties, rights, privileges, and franchises pledged in such deed of trust or mortgage, for the payment of the interest and final redemption of such company's bonds, due notice having first been given of such intended sale, by advertisement in such manner and for such length of time as may be prescribed in said deed of trust or mortgage; and in case of any sale of any railroad or railroads, or any part thereof, constructed, or in process of construction, by any

railroad company by virtue of any trust deed, or on foreclosure of any mortgage thereupon, the party or parties acquiring title under any such sale, and their associates, successors, or assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities and advantages in and by said mortgage or trust deed enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debts, so far as the same relate and appertain to that portion of said road, or the line thereof, mentioned and described in and conveyed by said mortgage or trust deed, and no further, as fully and absolutely, in all respects as the corporators, shareholders, officers and agents of such company, might or could have done theretofore, had not such sale or foreclosure taken place. Such purchaser or purchasers, their associates, successors or assigns, may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such changes or variations in manner and form of organization as their altered circumstances and better convenience may seem to require; *Provided, however*, That no greater or enlarged powers shall be exercised by the new organization than are conferred by the charter of such company.

Sec. 6. The Governor may, at any time during the prosecution of the work on any sections of road entitling any company to an issue of State bonds, engage the services of practical engineers or surveyors to visit, examine and report upon the amount and quality of all work done or being done thereon; and such engineers or surveyors shall certify

under oath to the Governor the condition and character of all such work, particularly specifying the quality, extent and character of the grading and excavations, as well as respectively all mechanical structures and other appurtenances of any such road or section, and whether in the opinion of such engineer or engineers, surveyor or surveyors, such railroad company are entitled to an issue of State bonds on account of such particular section or sections of road; but no such certificate, examination or proof shall be deemed conclusive or final, but new surveys or examinations may be ordered or other proof received in the discretion and to the satisfaction of the Governor before any such State bonds shall be issued thereon.

Sec. 7. This Act shall take effect and be in force from and after its passage.

Approved August 12, 1858.

Sections 4, 5, 6 and 7 of act of 1864, heretofore referred to in brief, are as follows:

Sec. 4. *And be it further enacted*, That it is hereby made a condition of the grants herein made, that said person or persons, or corporation, shall not acquire the title to the road-beds, right of way, depot grounds, culverts, bridges, turn-outs, switches, rights, privileges and franchises, and the track and line of the said Southern Minnesota Railroad Company, until said company shall fully complete and put in running order ten miles of said railroad; but said person or persons, or corporation, may have the privilege of entering into and upon said railroad track, right of way and depot grounds, for the purpose of contructing said railroad, and may have the privilege of acquiring the right of way over the property owned by individuals, in the same way as now specified in the charter of the Root River Valley and South-

ern Minnesota Railroad Company, approved March 2, A. D. 1855. And said company are hereby authorized and required to construct a railroad, with one or more tracks, from a point of junction with the Root River line, at or near Hokah, to the village of Brownsville, in the county of Houston, as provided in an act to execute the trust created by an act of Congress, entitled "an act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory," approved May 22, A. D 1857, within one year after the road is completed from La Crescent, via Target Lake and Chatfield, to a point of junction with the Winona and St. Peter, at Rochester. And upon the construction and completion of ten miles of said road, with the cars running thereon the Governor shall certify the same to the Secretary of the Interior, and thereupon, and not before, the said company may demand and be entitled to receive from said Governor, in the name of the State, a deed in fee simple of the one hundred and twenty sections of land which the State may then be entitled to, under the provisions of the act of Congress hereinbefore referred to, approved March 3, A. D. 1857, for the purpose of aiding in the construction of said road. And upon the construction and completion of each and every consecutive twenty miles of said railroad, the Governor of said State of Minnesota, acting for and in behalf of said State, shall execute, in the name of the State of Minnesota, under the great seal thereof, a full and absolute title in fee simple to all the lands appertaining thereto, which were conveyed to the said State or Territory of Minnesota, by an act of Congress, passed March 3, A. D. 1857, and entitled "an act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said

Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," and which would have accrued to the Root River Valley and Southern Minnesota Railroad Company, or Southern Minnesota Railroad Company, or to which it would, under any law of the Territory or State of Minnesota, or in any way or manner be entitled; and upon the execution of said deed, the said company, or the said person or persons shall have the absolute, full, and complete title to the said lands in fee simple.

Sec. 5. *And be it further enacted*, that the land granted or intended to be granted by the provisions of this act to this corporation, or to the persons herein named, (or to the persons) who shall be the purchasers of said Southern Minnesota Railroad, and who shall finish and complete said railroad herein mentioned, shall be and are hereby exempted from all assessments and from all taxation whatsoever, until the same shall have been sold and conveyed by the said company; and in consideration of an annual payment of a per centum, (as provided in this section,) by said corporation as aforesaid, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation, which by the provisions of this act contained, said corporation is to acquire, purchase, hold, possess, enjoy or use, for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to, and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section, the said company shall during the first three years after thirty miles of said railroad shall be

completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the State, one per cent. on the gross earnings of said railroad, the first payment to be made on the first day of March next, after the said railroad shall be completed and in operation, and shall during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent. on the gross earnings of said railroad; and shall from and after the expiration of ten years from the completion of said railroad, on or before the first day of March of each and every year pay into the treasury of this State, three per cent. of the gross earnings of said railroad; and the payment of such per centum annually as aforesaid, shall be, and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the Treasurer of this State, on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the Governor of this State, or any other person appointed by law prescribed, to examine under oath the officers and employees of said company, or other persons; and if any person so examined by the Governor or other authorized persons, shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the State the payment of the aforesaid per centum, it is hereby declared that the State shall have a

lien upon the railroad of said company, and upon all the property. estate and effects of said company, whatever, real personal or mixed, and the lien hereby secured to the State shall take and have precedence of all demands, decrees and judgments against said company.

Sec. 6. *And be it further enacted,* That whenever the said parties herein named, or said corporation herein mentioned, their successors or assigns, shall fully complete ten miles of said railroad, the Governor of the State of Minnesota, shall cancel all the bonds issued by the Southern Minnesota Railroad Company to the State of Minnesota.

Sec. 7. *And be it further enacted,* That the rights, privileges, franchises, road-bed, right of way, properties and immunities hereinbefore granted and assigned, are so granted, transferred and assigned, upon this express condition, that the said Southern Minnesota Railroad Company shall build and construct ten miles of said road within two years from the 20th day of January, A. D. 1864, and thirty miles of said road within three years from said 20th day of January, A. D. 1864, and fully build, construct and complete, and fully equip said road from La Crescent up the Root River Valley, via Chatfield, to a junction with the Winona and St. Peter Road at Rochester, on the present located line thereof, except so far as it may be necessary to change the same for engineering purposes, in coming up the valley of the Root river; and upon the failure to keep and perform either or any of the conditions in this section contained, all the unbuilt portions of said road, with the properties, rights and franchises appertaining thereto, shall be absolutely forfeited, and shall revert to the State, without any other act or ceremony whatever, *in which case the State shall hold and possess the same in the like character she* NOW HOLDS THEM *without any merger or*

extinguishment, to be used, granted and disposed of for the purpose of aiding the construction of said road. *Provided*, That the portion of the line of road commencing at Saint Paul and Saint Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi; thence to the southern boundary of the State, in the direction of the mouth of the Big Sioux, is hereby reserved by the State, with all the lands, property, franchises and rights pertaining to the same, to vest in such corporation as may be authorized and empowered, under the laws of the State to construct the same, or any part thereof.

ARGUMENT.

We have thus given at length all the laws creating and amending the charter of the plaintiff in error, and the statute upon which we claim a right to recover.

First. Did the act of 1871, in establishing a maximum rate of charge for freight, &c, impair the obligation of any contract derived by the railroad company from various prior Legislative acts in violation of the rights of the defendant under the Constitution of the State of Minnesota, and the Constitution of the United States?

We think it did not.

As there was *no express* authority granted or given to the railroad company to charge any toll, by *implication only* it has a right to charge some toll, and the rate of toll is entirely *within the power and under the control of the sovereign.*

"Inasmuch as it is the duty of the government, with

respect to the welfare of the public in general and of trade in particular, to provide safe and commodious ways of communication wherein flows the right of the state to oblige those who make use of the ways it provides, to contribute to the expense of making and maintaining them, *i. e.*, to levy tolls, it follows that the right to make roads and *levy tolls* is a prerogative of sovereignty, and in the hand of a subject is a *franchise* or immunity of a public nature which cannot be legally exercised without legislative authority."

Vattel, book 1, chap. 9, section 100, 102.

2 Kent, pp. 458, 459.

19 Minnesota, Blake vs. W. & St. P. R. R. Co., 418.

"Nor is there now any question, at least in this court, that the right to maintain a railway and take tolls or fares is such a privilege or immunity, for the same reason that the right to build an ordinary road and levy tolls thereon is, viz.: That a railroad is but an improved modern highway, one which it is the duty and interest of the government to construct when the public interest and convenience demand it."

19 Minn., Blake vs. Winona and St. P. R. R. Co., p. 418.

Davidson vs. Ramsey Co., 18 Minn. p. 482.

Sharpe vs. Mayer, &c., 21 Penn. 81, 147.

25 Vermont, 433, 441.

Olcott vs. Supervisors, Fond du Lac Co., Wisconsin, in 16 Wallace, 678.

"This franchise of the defendant then is a privilege of the sovereign in the hands of the subject. The subject is indeed in the present case an artificial being, but the sovereign might have placed this privilege in the hands of a natural person, and it might have been his property as it is the defendant's property."

"In the use the defendant shall make of its property, *this defendant is as entirely subject to the legislative control as such supposed natural person would have been.*"

11 Minn., 575.

19 Minn., Blake vs. Winona and St. Peter R. R. Co., supra.

"The franchise in question being a privilege of the sovereign, and which the sovereign could alone impart, was originally in the sovereign's control in every respect.

"It is therefore entirely competent in conferring such a franchise to retain authority to control the defendant in its exercise—possessing such right originally, it must continue to possess it, that is to say, it *must retain* it in any given case in so far as it does not part with it by conferring exemption therefrom upon the recipient of the franchise.

"It follows as respects this franchise that *the sovereign which conferred it retains its original right to control the defendant* in its exercise of the same, *so far as it has not surrendered its authority.* The contract here we assume is that the defendant may take *some tolls. That is what the sovereign granted it.* To the extent to which such a grant necessarily involves exemption from legislative control as aforesaid, the sovereign has surrendered such original right of control; *no further.*"

19 Minn., Blake vs. Winona & St. Peter R. R. Co., supra.

"*The Legislature may also from time to time regulate the use of the franchise and limit the amount of the toll* which it shall be lawful to take in the same manner as they may regulate the amount of toll at a ferry or for grinding at a mill, *unless they have deprived themselves of that power by a legislative contract with the owners of the road.*"

Per Walworth, Ch., in Beekman vs. Saratoga & Schenectady Railroad, 3 *Paige*, 45.

Says the Supreme Court of Minnesota in case Blake vs. Winona & St. Peter Railroad Co., supra, in commenting on above: "We cite it as expressing our own views as well "as those of an eminent jurist on this point, expressed when "railroads were in their infancy."

"It is one of those plain and simple propositions, as it seems to us, upon which *because it is so indisputably true there can be no accumulation of authorities.*"

But before railroads were known in this country a similar position had been taken with respect to a ferry franchise.

"The Legislature," says Chief Justice Parker, "having originally the only right to grant the exclusive privilege of transportation over public waters, and to establish tolls, &c., the grant of this privilege would always be considered as subject to the superintendence of the Legislature, *unless* that was *expressly surrendered.*"

Charles River Br. vs. Warren, 7 Pick. 511.

Again—has the Legislature deprived itself of the power to regulate tariff of rates on freight and passengers *by a* contract with the company? *If so, where is it expressed?*

No rule is better settled than that charters are to be construed strictly against the corporators.

Providence Bank vs. Billings, 4 Peters, 514.

Charles River Bridge vs. Warren Bridge, 11 Peters, 544.

Perrine vs. Chesapeake & Delaware Canal Co., 9 How. 172.

The just presumption in every such case is that the State has granted IN EXPRESS TERMS *all that it designed to grant at all.*

Cooley's Constitutional Limitations, 394 and 395.

"When a State" says the Supreme Court of Pennsylvania, "meant to clothe a corporate power with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, *it is so easy to say so, that we will never believe it to be meant when it* IS NOT SAID. *In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt* IS AGAINST THE CORPORATION."

"*If the usefulness of the company would be increased by extending* (its privileges), *let the legislature see to it, but remember that nothing* BUT PLAIN ENGLISH WILL DO IT."

Pennsylvania R. R. Co. vs. Canal Commissioners, 21 Penn. St. 22.

Commonwelth vs. Petersburg, &c. R. R. Co., 24 Penn. St. 159.

Chenango Bridge Co. vs. Binghampton Bridge Co., 27 N. Y. 93, per Wright J.

The rule is not confined to the grant of a corporate franchise, but it extends to all franchises or privileges by the State, &c.

Cooley's Constitutional Limitations, pp. 395 and 396 and cases there cited.

The Supreme Court of Minnesota, in case Blake vs. Winona and St. Peter R. R. Co., supra, say: "Is an agreement that the defendant must take some tolls expressly or by implication an agreement that the State will never assume to regulate the use of the franchise and limit the amount of tolls the defendant may take?"

"*This question must be answered in the negative.* The State we assume has conferred the right to make some charge, *i. e.* to take some toll—not any specified rates of toll, nor to take tolls within any specified limits, nor to take reasonable tolls; the right it conferred is simply to take tolls.

"If this right cannot in the nature of things exist along with the right aforesaid, in the Legislature, to regulate its use and limit the amount of tolls the defendant may take, then of course the right to control is gone.

"But it is obvious that the two can co-exist, *i. e.*, a right simply to take some toll can be exercised to its full extent under a law fixing a *maximum* rate of toll, for in taking such *maximum* rate some toll is taken, and the extent of right is only to take some toll. As therefore, a fixing of maximum rate of toll by the act of 1871 does not interfere with defendant's right to take some toll, it is not unconstitutional or impairing the obligation of any contract between the defendant and the State, and it was competent for the Legislature to enact it, in the exercise of its unsurrenderd authority, to control the defendant in the exercise of the franchise conferred."

See also Beekman v. Schenectady & Saratoga R. R. Co., 3 Paige, 45.

Bloodgwood vs. Mohawk & Hudson R. R. Co., 18 Wendell, 2.

West River Bridge Co. vs. Dix, 6 Howard, 507 (547.)

In 1857 the Legislature of Minnesota granted a charter to the Minnesota and Pacific Railroad Co., (now St. Paul & Pacific) in which they expressly gave them (board of directors) the right to establish such rates of toll and charges for the conveyance of persons and property upon its railroads as they should from time to time determine, and to change the same and to levy and collect the same, &c

See Laws Minnesota 1857, p. 6, section 7.

The legislature had the matter in mind, but conferred no

such power on this railroad company—if they had, such would have been vested rights.

Second. The original charter shows clearly to our minds that the legislature intended to exercise a fatherly care *and control* over the railroad company.

The original charter, section 16, *provides "This act is declared to be a public act and may be amended by any subsequent legislative assembly* IN ANY MANNER.

Session Laws Minn. 1855, p. 73.

In 1856 the charter was amended, giving the railroad company a right to build a branch road, &c., and section 16, chap. 24, Laws Minn. 1855, (the section above referred to,) was amended so as to read as follows: "*This act is hereby declared a public act and may be amended by any subsequent legislative assembly in any manner not* DESTROYING OR IMPAIRING THE VESTED RIGHTS OF SAID CORPORATION.

Laws Minn. 1856, p. 91.

What vested rights had the railroad company under the original charter in regard to charges for fare or freight? No provision was made for any rate, nor for the company to fix any rate. The Legislature had retained the right to amend the charter *in any manner.* No right to charge what they pleased, or to establish any rate, reasonable or otherwise, was vested in the railroad company. The right reserved by the Legislature to amend in *any manner* was broad and sweeping; it meant they didn't intend to clothe the company with any sovereign power, and therefore the railroad company seeing they had no vested rights obtained the amendment of 1856, which providing that the act might be amended in any manner not destroying or impairing the vested rights of said corporation.

The original act appointed the first Wednesday of July, 1855, for a meeting of the corporators to determine whether they would accept or reject the charter. (See section 8, laws 1855, original charter.) It is admitted by the pleadings it was duly accepted, and the proviso was: *It could be amended in any manner*, but an afterthought in regard to the expected land grant was no doubt the reason for the change in 1856. The company did not want to risk their rights in the land grant or right of way, &c., under such a proviso, and again after the grant of lands by act of Congress in aid of certain railroads in Minnesota, approved March 3, 1857, the Legislature of the Territory, by an act approved May 22, 1857, transferred to said railroad company all the lands, interests, rights, powers and privileges granted to and conferred upon the Territory in and by virtue of said act of Congress, applicable to the lines of road which it was authorized to build, to said company, and the said act of the Legislature required the railroad company to accept the same by resolution, to be filed within 30 days after the passage of said act, in the office of the Secretary of the Territory, which the pleadings also admit was done and charter duly accepted. But the amendment made it no better for the corporation than the original act, as far as controlling a tariff of rates of freight and fare, and left them still the creatures of the creator, with the right to amend in any manner not destroying or impairing the rights *expressly named* and vested by the original charter and amendments to it. The company gained so much by the amendment, *no more*.

The act of of 1857 (Laws Minn. 1857, sections 3, 4 and 5, pp. 19 and 20,) disposing and conferring the lands granted by Congress to the defendant, expressly provides that the railroad company *shall possess, exercise and enjoy the same rights*,

privileges, FRANCHISES, *authority and immunities, &c., as are granted to said company by* BY THEIR ACT OF INCORPORATION.

In the Pennsylvania Colleges case, 13 Wallace, 190, the opinion of the court states that "cases often arise when the Legislature in granting an act of incorporation for a private purpose, either make the duration of the charter conditional or reserve to the State the power to alter, modify or repeal the same at pleasure. *Where such a provision is incorporated in the charter it qualifies the grant*, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution. Such a power also, that is the power to alter, modify or repeal an act of incorporation is frequently reserved to the State by a general law applicable to all acts of incorporation or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. Reservations in such a charter, it is admitted, may be made, and it is also conceded that when they exist the exercise of the power reserved by a subsequent Legislature does not impair the obligation of the contract created by the original act."

The same point is ruled in many cases, amongst others in

Miller vs. State, 15 Wallace, 478.

Tomlinson vs. Jessop, 15 Wallace, 454.

Holyoke Co. vs. Lyman, 15 Wallace, 500.

McLaren vs. Pennington, 1 Paige, 102.

Re Oliver Lees Bank, 21 N. Y. 9.

Perrin vs. Oliver, 1 Minn. 202.

Mayer, &c., vs. Norwich & W. R. R. Co., 109 Mass. 103.
Parker vs. Metropolitan R. R. Co., 109 Mass. 506.
Stephens vs. Smith, 29 Vermont, 160.

In Wisconsin the power to alter or repeal a general or special act is a provision of the Constitution.

In *Olcott vs. Supervisors* (a case from that State to this court,) 16 *Wallace*, 678, turning on the relation of a railroad company and the State, the court takes occasion to say of the reserved power in the Wisconsin Constitution, "That the Legislature may alter or repeal the charter granted to the Sheboygan and Fond du Lac Railroad Company is certain. This is a power reserved by the Constitution. The railroad therefore can be controlled and regulated by the State. Its use can be defined—*its tolls and rates for transportation may be limited.*"

The power to amend in this case was reserved in the original charter and amendments, and has the same force as if a power had been reserved to alter or repeal in the Constitution.

Again, after the foreclosure by the State, an act was passed in 1864 (See Special Laws of Minn. 1864, section 1, proviso, pp. 148, 149 and 150,) vesting in the Southern Minnesota Railroad Company all the rights, &c., *of which they had been divested by the foreclosure*, except such as were retained by the provisions of that act, and all the rights, franchises, property and interest granted by the Territory of Minnesota to the Root River Valley and Southern Minnesota Railroad Company, or Southern Minnesota Railroad Company, *by the act of March* 2, 1855, (original charter of company,) and acts amendatory thereto, *and be subject to all the conditions and provisions of the said act, excepting as altered or changed by this act.*" See end of section 1, said act, ante.

What was vested in the railroad company by this act? All the rights obtained by the foreclosure—nothing more, and it would be an absurdity to say that the mortgagor can vest in his mortgagee a greater estate than he had himself. Perhaps the Statute of 1871 may lessen the means of payment of the railroad company. So would a fine for homicide, under the police power of the State. But to lessen the means of payment of a contract is not to impair the obligation of the contract. The railroad company took their franchises, and their creditors invested their money, *subject to the reserved power*, and suffer no legal wrong when that is exercised. *Atty. General vs. Chicago & N. W. Railway Co. in injunction cases, Supreme Court of Wis., infra.*

The railroad company upon these conditions received all their rights, franchises, property, &c., and one of the conditions of the original charter was that the Legislature could amend it in any manner, and the amendment to it in 1856 did not by any means take away the right of the Legislature to fix the rate of fares for passengers and freight.

Again—in 1867, (Special Laws, Minn. 1867, p. 7,) an act was passed and approved February 25. 1867, accepting an additional grant of lands from Congress, and vesting it in the defendant on certain conditions, one was as follows: (See section 2 of said act.) "Provided, That the Legislature shall have the right to fix and regulate from time to time the rates of freight and passenger tariffs on said railway or any branch or division thereof."

By section 7 it was provided that the company should within 30 days accept such act by resolution and file a copy of said resolution in the office of the Secretary of State The counsel for the plaintiff in error say, "*This act was never accepted by the company.* At the same session of the Legislature

about *ten days after the approval of the foregoing act*, to-wit: By an act approved March 7, 1857, the foregoing section 2 was amended by *omiting* the italicised clause." Why was it done? *The 30 days had not expired for them to accept.*

The Legislature by the passage of the act of February 25, 1867, intended to set the question at rest in regard to its sovereign power to fix the rates of freight and passenger tariffs by having the company assent to it when giving the additional grant of lands. No doubt the company claimed the right under the amendment of section 16 of original charter of fixing the rates themselves, but seeing they could not have such a right inserted in their charter, and having been the recipient of favors lavishly showered upon them by the Legislature, and being still in their good graces, *got the act amended before the 30 days had expired for them to accept.* THEY NEVER REFUSED, *and never intended to refuse.* The Legislature being controlled by the lobby, doubtless, were contented to leave the matter to some subsequent Legislature to take the responsibility of fixing the rates and to the courts what vested rights the railroad company had under the original charter and amendment thereto.

Second. But it is said *as a second* objection, it deprives the plaintiff in error of his property without due process of law, within the provisions of section 7 of article 1 of the Constitution of the State of Minnesota, or of the 14th amendment of the Constitution of the United States.

The Supreme Court of the State of Wisconsin, in railway injunction suits (opinion by Chief Justice Ryan,) in Attorney General vs. Chicago & N. W. R. Co. and vs. Chicago, Mil. & St. Paul Railway Co., Sep. 15, 1874, on this point say: "It was said that chap. 273 (an act similar to the Minnesota act of 1871) violates the right of property of these defendants.

We cannot perceive that it does. Whether it will lessen the income of their property we cannot foresee. We only know that it does lessen their rates of toll. But it does not wrongfully touch their property.

"As far as the franchise is to be considered property *it was subject to this very limitation; and the limitation is the exercise of a right over it which does not violate it.* The right of limitation entered into the property and qualified it—and the act does not at all meddle with the material property distinct from the franchise. It acts only on the franchise not at all upon the material property; and it is sufficient to say that they acquired the material property as distinct from the franchise, *subject to the alteration of the franchise under the reserved power. That was a condition under which they chose to hold their property, and they have no right to complain when the condition is enforced.* Their rights in their material property are inviolate, and shall never be violated with the sanction of this court. But they are no more violated by this act and its enforcement, than by a foreclosure of a mortgage, or ejectment by paramount title. It is a right over property that is enforced, not a wrong to right in property."

"We have no doubt of the general authority of a State Legislature to regulate tolls of a corporation of this character as a necessity of public welfare and public order under the sovereign power of police, when the exercise of that power is not in some way suspended or restrained.

"Any authority of the Legislature not under the reserved power of the Constitution to regulate tolls under a franchise to take tolls cannot be derived from the judicial function, but must rest in some proper legislative function."

Third. We come now to the *third* and last point made by the plaintiff in error, viz.:

Is the act in violation of section 4, of article 10, of the Constitution of the State, and therefore void? Section 4, of article 10, of Constitution of Minnesota, is as follows:

"Lands may be taken for public way for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such lands and the damages arising from the taking of the same; *but all corporations being common carriers, enjoying the right of way* PURSUANT TO THE PROVISIONS OF THIS SECTION, *shall be bound to carry the mineral, agricultural, and other productions or manufactures on equal and reasonable terms.*

First.—The charter of the defendant was granted in 1855, and the railroad company does not enjoy its right of way pursuant to the provisions of that section, but under the laws of the Territory of Minnesota.

Sections 4, 5, 6 and 7 of original charter (Laws 1855 heretofore given in full,) provides for and gives the railroad company the right of way, &c. The lands were donated by Congress to the Territory in aid of railroads, and by the Territory to the railroad company in March and May, 1857. The railroad company in accepting the grant, agreed that the railroad should be a public highway *free* for the use of the government of the United States from any toll or charge upon the transportation of property or troops of the United States, and the United States mail shall be transported over said railroad under the direction of the post office department, &c.

How much of the right of way was through those lands donated, or how much the State donated, or how much obtained from private parties, or how much was located before Minnesota became a State, we are not prepared to say, but we assert that the right of way was obtained by the railroad

company under the provisions of sections 4, 5, 6 and 7 of its original charter, and a good part of it, if not all the right of way secured before we became a State, and that when we became a State, by amendment to the Constitution at time of admission into the Union, the State of Minnesota was authorized to loan its credit to railroads, not exceeding $5,000,000 on certain conditions, and that this railroad company (with others) received bonds of the State, and mortgaged its road-bed, lands, property, &c. as security therefor. (See act entitled an act proposing an amendment to section 10, article 9 of the Constitution, and providing for the submission of the same to the people,—Laws, Minnesota, chapter 1, page 10,—in regard to loan to railroad company and security for same. Also amendment to section 10, article nine, Minnesota Constitution; and also section 10 of said article 9 expunging the amendment.)

The mortgage was pretended to be foreclosed by the State, and after claiming to have acquired all the property of the railroad company by the foreclosure (although the State repudiates the bonds which were the only considerations for the mortgage,) the State, by act approved 4th March, 1864, grants and transfers all its rights, benefits, privileges, property, franchises and interest of the Southern Minnesota Railroad Company acquired by the State described in said act of incorporation of March 2d, 1855, and several acts amendatory thereto back *to the Southern Minnesota Railroad Company*, (the plaintiff in error.) "*For the purpose of carrying out and effecting the objects of this act*, the Southern Minnesota Railroad Company and their successors and assigns shall have and be possessed of all the powers, immunities, franchises and privileges contained in and provided for in the said two acts referred to in this section (original charter and land grant act of

May 22, 1857,) and be subject to all the conditions and provisions of the said act, excepting as altered or changed by this act." (See sec. 1, act of March 4, 1864.)

The original charter provided that the Legislature were empowered to amend in any manner. The amendment to it was to protect their rights in lands, &c Under that charter and amendments, both the Territorial and *State* Governments were authorized to make such amendments, and one of its powers is to fix the rate of tolls. The railroad company were never vested with such a right by their charter or amendments, but what the sovereign was empowered to regulate and control; the laws of 1871, establishing maximum rates of tolls, is not within the provision of this section of the Constitution of Minnesota, for no such provision existed when the charter was granted. The Constitution was not in existence. Nor is the railroad company a common carrier enjoying the right of way, pursuant to the provisions of this section? Unless by foreclosing the mortgage, the rights acquired made it so. Yet we claim the charter was not merged or extinguished by the foreclosure. *And the act of* 1864, *section* 7, distinctly shows upon what conditions the State assigned its rights back to the company; that in case of failure of the company "*to keep or perform either or any of the conditions, all the unbuilt portions of said road, with the properties, rights and franchises appertaining thereto, shall be absolutely forfeited, and shall revert to the State without any other act or ceremony whatever, in which case* THE STATE SHALL HOLD AND POSSESS THE SAME IN THE LIKE MANNER SHE NOW HOLDS THEM, WITHOUT ANY MERGER OR EXTINGUISHMENT, to be used, granted, and disposed of, aiding the construction of said road.

Second.—If it should be held that the company do enjoy the right of way under the provisions of that section of the

Constitution, it is still constitutional for the Legislature to make a law establishing the maximum rate of tolls.

The tariff of rates fixed *are maximum* rates.

The common carrier, under that section of the Constitution, enjoying the right of way, &c., *is bound to carry* the mineral, agricultural, and other productions or manufactures, on *equal and reasonable terms.*

It is an injunction upon the carrier and not the Legislature.

The stipulation is only to the effect that the maximum rates, if charged by the common carrier upon all of the different articles named does, in some instances, make arbitrary and unjust discriminations between the different products.

It is not unconstitutional for the Legislature to enact maximum rates of toll to be charged for carriage of different articles under a charter like the plaintiff in error.

The common carrier must so apply those maximum rates so as to make them equal for all classes of products and manufactures.

Say the Supreme Court of Wisconsin, (opinion by Chief Justice Ryan in Railway Injunction Suits, September 15, 1874, Attorney General vs. Chicago & N. W. R. R. Co., supra,) in a case under a similar statute, and where the right to amend a charter is given by the Constitution: "We are of opinion that the franchise is not one vesting in the corporation an absolute right of exacting whatever tolls it might see fit. The courts have authority to limit the right to reasonable tolls—to tolls reasonable, not in the arbitrary judgment of the corporation, but in fact. That is, indeed, as against a great railroad company, not a very effective remedy. But the law gives the remedy to all aggrieved by the exaction of unreasonable tolls—the question here, however, is not what the courts can do to control the exercise, but what the Legislature can do by statute to limit the right of a franchise so broad that it seems to invite extortion. We have already

sustained the power of the Legislature to limit rates of tolls of railroads *subject to Legislative control. But that power rests on the authority of the Legislature not on the reasonable rate of tolls fixed.*"

We do not admit that the common carrier, *enjoying the right of way under the provisions of that section* of our State Constitution, has a right to charge maximum rates on all the articles enumerated, so as to make unjust discrimination in carrying the different products, and on unequal terms. It is a common rule that where there are two statutes upon a subject not inconsistent or any repealing clause, both shall stand and be read together. Why not this statute and the provision of the Constitution addressed to the carrier?

Let the carrier take the Constitution which is addressed to it, (if it enjoys the right of way under the provisions of that section) and the law of 1871, fixing the maximum rates, and there would seem to be no difficulty from both for the carrier to make a tariff of rates within the statute and the Constitution.

In conclusion we desire to say that the Legislature having the sovereign power under the charter to control the rates of fares and freight, and coming from every part of the State, are more competent to fairly establish a rate of reasonable tolls than a common jury from one locality, and the corporation to us would seem to be too much interested to do it. The rates established for an Eastern road would seem to be extravagantly large, and yet the immense land grant that will some day make this corporation a giant in wealth, is not taken into consideration, it is not expected it can become so in so short a time, and of this it complains. The railroads have little to complain of as to the sovereign's liberality—from year to year it has come to its creator for further power and indulgence, and the statutes enacted show

plainly that its requests have not fallen upon deaf ears or miserly hearts. We admit we have been greatly dependent upon foreign capital for the development of our State, and that with it the railroads have done much, very much in enhancing the value of our lands and products, making every part of our State easy of access to market, and it is perhaps to be regretted that there has been some excitement against railroads, although to our minds greatly exaggerated; but in this State, if it has been unwise, it has not been vindictive. If the people have been angry, the companies have been certainly too defiant, and have hitherto controlled their own rates, and this controversy may bring about a better and permanent understanding between them.

Nor are we at all alarmed, as our learned opponents seem to be, that a decision adverse to them will have the effect to drive capital from our doors, or that it will be less secure, or that the State wishes to impair the obligation of contracts. It is the wish of the State to treat all capitalists and railroad companies with justness, inviting them to our doors, fully assured that they will still find a profitable field to invest in, and that the benefits derived are mutual. But in order to be true the State must be just as well as generous, and can never admit that it has parted with its sovereignty, when it has not, even though it be to drive capital from our doors.

The question now arises has the State in its legislative blindness, abundance and generosity, so enacted that the carrier it created has taken from it all its sovereign power to control its rates and tolls, and is no longer, in that respect subject to its maker?

We ask that the judgment of the Circuit Court be affirmed.

E. C. PALMER,
of Counsel for defendant in error.
With T. R. HUDDLESTON,
Attorney.

HENRY W. HOWELL

vs.

The Western R. R. Co. et al.

SUPREME COURT OF THE U. S.

ARGUMENT FOR APPELLEE.

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SUPREME COURT OF THE UNITED STATES.

ARGUMENT OF DEFENDANT'S COUNSEL.

HENRY W. HOWELL
vs.
THE WESTERN RAILROAD CO., AND OTHERS.

It is not denied that the five bonds of one thousand dollars each upon which this suit was brought were received by Henry J. Rogers as compensation for his services as one of the trustees named in the mortgage which is sought to be foreclosed, and that he, Rogers, paid no other compensation or consideration for said bonds. (See page 60 of the "case.")

Defendant says that the mortgage was made, and the bonds secured thereby were issued fraudulently by Andrew J. Jones, then President of defendant, and in pursuance of a conspiracy entered into between said Jones and others to cheat and defraud defendant out of all its property; that none of said bonds have passed out of defendant's possession for value, and that none of said bonds have passed into the hands of innocent holders. This defence is fully set out in defendant's answers to the 6th, 7th, 8th and 10th interrogatories of the bill, and is found on the 20th to 25th, and 49th to 52nd pages inclusive, of the "case."

The facts shown in the evidence, and relied upon to substantiate this defence, are as follows:

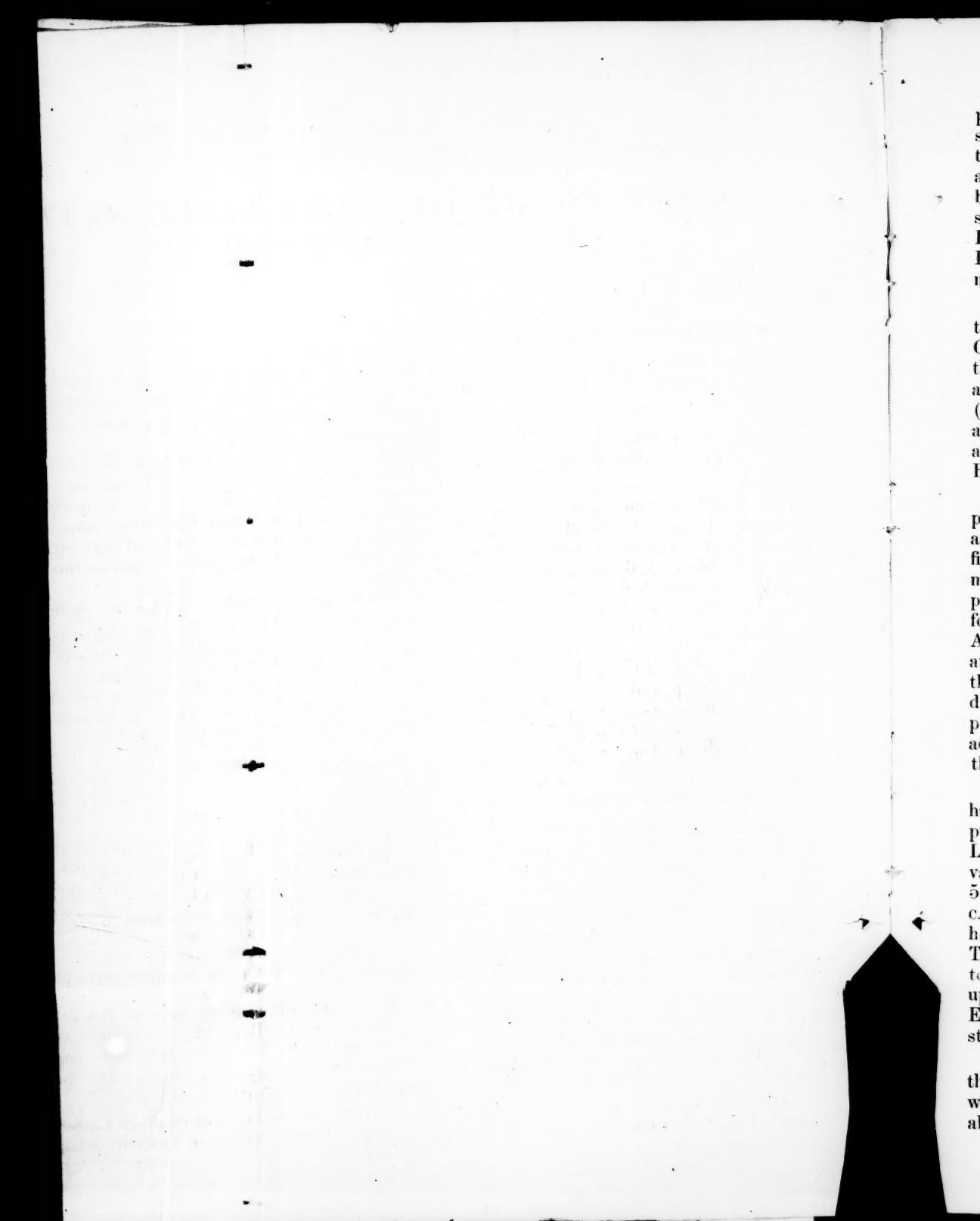
1st. By acts of Assembly of North Carolina, 21st of August, 1868, and 2nd February, 1869, the defendant's charter was so amended as to place the affairs of the Company entirely in the hands of the State, the State appointing 7 directors, and the individual stockholders 2. When the Company was re-organized under this amendment on the 1st of April, 1869, seven directors were appointed by the State, not one of whom, before that day, was a stockholder in said Company, (see pages 65 and 81) and as a matter of public history, each one was a member or clerk of the Legislature.

One T. S. Lutterloh transferred to them stock to enable them to qualify as directors (page 66). One of their number was immediately elected Treasurer, resigned from the directory and said Lutterloh was chosen by them a director in his stead (page 66).

2nd. In April 1870, a resolution was adopted in general meeting of Stockholders to authorize the President and Directors to mortgage the road; and though this measure was opposed by the private Stockholders, it was carried by the vote of the State's proxy (a member of the Legislature), and many of the private Stockholders refused to vote [see pages 80 to 83, also page 75]. One objection to allowing them to mortgage was that the President had received $1,300,000 State bonds for which he has not accounted [page 75].

3rd. In October, 1870, a contract was made for the completion of the road [see copy, page 35]. The contractors, J. Hunt & Co., were insolvent [see page 103]. The rates were exorbitant [page 72]. This contract was awarded to Hunt & Co. by a Committee of Directors and the President. T. S. Lutterloh was a member of the committee [pages 124 and 125]. By its terms (article 7) this contract was not assignable except with the consent of the Chief Engineer (see page 37), but in December of the same year Hunt & Co. transferred and assigned the contract to T. S. Lutterloh (page 41), and the Chief Engineer was COMPELLED to consent thereto (page 73).

4th. The mortgage was executed October 31st, 1870, and R. Y. McAden, T. S. Lutterloh and HENRY J. ROGERS were named therein as trustees. This Rogers is the party from whom com-



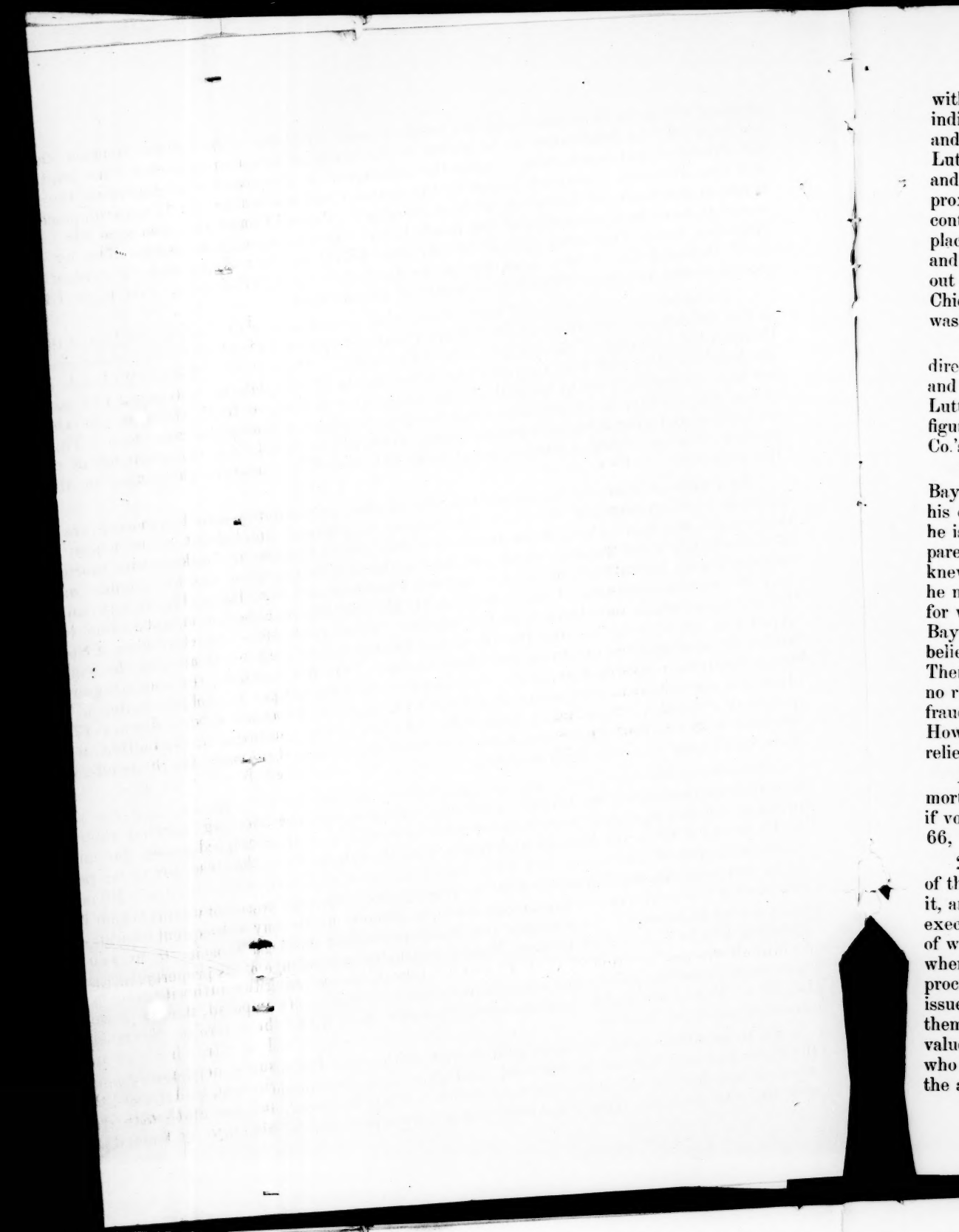
plainant claims to have purchased the bonds in suit. By the terms of the contract (article 12, see page 39) the bonds were to be placed in the hands of an agent subject to the joint order of the President and contractors. After the assignment of the contract to Lutterloh the President and two Directors attempted to modify the contract and amend Article 12 so as to place all of the bonds in the hands of Lutterloh without security. (Pages 115 and 116, also page 108.) Lutterloh seems to have had possession of the bonds before the assignment was assented to by the Chief Engineer, for on December 22d, 1870 (the date 1872 in the printed case is evidently wrong) L. P. Bayne & Co. in New York receipt to Lutterloh for 425 bonds. (See page 135.) The mortgage was to secure $900,000 in bonds of $1,000 each.

Lutterloh being threatened with prosecution turned over 460 bonds and assigned the contract to the defendant—the Western Rail Road Company (pages 74 and 131), and transferred to said Company the receipt of Bayne & Co. for 425 bonds. (Page 135.) These 425 bonds are still in the hands of Bayne & Co., (page 74) or in the hands of complainant (see pages 113 and 114) and are held subject to a claim for $20,523 93 acceptance in favor of R. Y. McAden, the other trustee. (Page 135). Five bonds were received by Rogers upon executing the mortgage. This was unauthorized and illegal, because the mortgage expressly stipulates for the payment of trustees in another manner. (See mortgage, articles II, III and IX.) Rogers is partner in the firm of Bayne & Co.

So it appears from the testimony that the parties interested in the foreclosure are the complainant and Bayne & Co., of which firm Rogers is partner, and McAden, in whose favor the acceptance was said to have been drawn, and this suit is brought to foreclose the mortgage upon five bonds taken by Rogers, trustee, without authority, to pay him for his trouble in case the mortgage ever had to be foreclosed. Did the President of the Company have any authority to pay the trustees in bonds? No. Articles II, III and IX provide for compensation to trustees for services "which they shall hereafter render." (See article IX.) By resolution of Stockholders April 7th, 1870, (page 17) the President AND DIRECTORS are authorized to ISSUE the bonds, but no authority is granted to the President alone to issue. On the contrary, the contract provides that these bonds be placed in the hands of an agent, to be held subject to the joint order of the President and contractors. (See contract, article XII, page 39, Dunlap's Paley's Agency 177. As to power of President, Abbot's Dig. Law Corp. 553,581. The resolution of Committee on Contracts, adopted 14th October, 1870, two days after the contract was executed, was of no effect, because then said committee was functus officio.

Such being the case, there was no legal delivery of the bonds to Rogers, and the said bonds having been transferred by Rogers, A TRUSTEE, to the complainant Howell, and on their face expressing the fact that they were secured by a mortgage, and Howell having seen the mortgage at L. P. Bayne & Co.'s, fix Howell with notice that the trustees were not entitled to be paid in advance with part of the bonds, and with further notice that Rogers was a trustee (Hill on Trustees 513), and with the legal principle that no trustee can enter into engagements in which he has OR CAN HAVE a personal interest conflicting with the interest of those whom in his fiduciary capacity he is bound to protect. (See cases cited in Zinn's leading cases on Trusts, 76 to 175; Hill on Trustees 114 to 534. And further, Rogers as trustee was agent for the bondholders, and notice to himself was notice to Howell. (Pierce vs. Emery 32 N. H. 484. Howell was at least put upon enquiry before purchasing these bonds from a trustee. (Bunting vs. Ricks, 2 Dev. & Bat. Eq. N. C. Rep. 130, Smith vs. Fortescue, Busbee's Eq. N. C. Rep. 127.) So much for constructive notice to Howell.

So, to establish fraud, we have proven that neither the President nor Directors appointed by the State had any interest in this road until after their appointment. As a matter of history, they were all members or officers of the Legislature. That Lutterloh supplied them with stock to enable them to qualify. That they were completely under Jones' influence and acted in concert



with him. That a place was made for Lutterloh on the Board. That the Directors elected by individual Stockholders were the representatives of the town and county and were under Jones' and Lutterloh's influence. That a contract ruinous to the Company was entered into—Jones and Luttterloh acting a conspicuous part—with men of no means, and no bonds required. That Jones and Lutterloh were ardent advocates of the authority to make mortgage, and used the ex-State's proxy to pass the resolution, and afterwards Jones produced a new proxy. That though the contract was not transferable, it was transferred to Lutterloh for $500, and the bonds were all placed in Lutterloh's hands, except those pledged to L. P. Bayne & Co.,—i. e. Bayne and ROGERS—and they were put under his control subject to the claim of Bayne & Co., and this was done without waiting for the ratification of the transfer, and the modification of the contract. That the Chief Engineer was compelled to assent to the assignment against his protest. That the contract was then modified so as to put all the bonds in Lutterloh's hands and no security required.

And this culminates the fraud and conspiracy: Lutterloh, the intimate friend of Jones—director, trustee, member of committee on contracts—becomes contractor also, and he and Bayne and Rogers have all the bonds under their control and the Company has nothing. (See also Lutterloh's propositions to Williams and McKethan, pages 76, 83, 84.) His demanding exorbitant figures for the surrender of the contract—page 127. His statement that he could defeat Bayne & Co.'s claim against the Company—page 84.

This makes it clear. We submit that there was a conspiracy—that Jones, Lutterloh and Bayne & Co. were engaged in it. Now, how do we connect complainant Howell with it? By his own testimony: He is intimate with Bayne & Co.; they are his bankers and he is a broker: he is at their office every day; he takes these bonds without enquiry and for a high figure compared with the estimate of their value by his own witness at page 105. He first stated that he knew nothing of any other of the bonds, and upon further and closer examination he admits that he not only knows about them, but that they are in his possession—exactly how, for whom or for what purpose he never intelligently tells—and he was obliged to admit that he had visited Bayne & Co. during the recess in his examination. Taking his whole testimony, he cannot be believed when he says that he had no conversation with them upon the subject of his examination. Therefore, we submit that in either view: 1st. That Rogers was not a bona fide holder, having no right to take the bonds, and that Howell had constructive notice; or, 2nd. That there was fraud in the issue or attempted issue, and the Company received no value for the bonds, and that Howell was either a party to or had knowledge of the attempted fraud. He is entitled to no relief.

Another point: If there was no valid State's proxy at the meeting which authorized the mortgage, there was no quorum; if no quorum, no meeting—the attempted action was void—and, if void, it could not be ratified by a simple resolution voted for by the true proxy. (See pages 66, 75, 81, 135, 136.)

2nd. It is maintained on the part of the appellee that the bonds were not warranted by the terms of the act under which they purport to have been issued, nor by any subsequent modifications of it, and are therefore void. Whether a railroad corporation has legal capacity to borrow money, execute its bonds therefor, and secure their payment by a mortgage of its property, in the absence of words in the law creating it, directly or by implication conferring the authority, it is plain that where such power is given with certain restrictions and limitations imposed, the corporation must proceed under the law and in conformity to its requirements, and the exercise of the power to issue bonds, not in substantial accordance with its provisions, would be ultra vires and the bonds themselves invalid. They would be equally so in the hands of a subsequent purchaser for full value and without notice of the infirmity. This follows from the principle, well settled, that those who deal with agents and officers of a corporation acting as such, must see that authority to do the act is conferred, and also in the case of a corporation, which exists only by force of positive

law, whether the power is granted to the corporation, and, if under limitations, whether those limitations are observed. This principle is declared and enforced in an elaborate and able opinion of Judge Redfield, which will be found in his Law of Railways—vol. 2: 673, and sustained by a decision of the Supreme Court of Massachusetts upon the same facts—Commonwealth vs. Smith, 10 Allen R. 443. The material facts of this case are these: In the year 1854 the General Assembly of Massachusetts passed an act entitled "An Act to authorise Railway companies to issue bonds." The 1st section recites the purposes for which such corporations may issue bonds, to-wit: "for funding its floating debt or for money which it may borrow for any purpose sanctioned by law" when authority is given by a majority of stockholders convened for that purpose, and then in an amount not to exceed the capital actually paid in. The 2nd section declares that such bonds may be issued in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from date, and at a rate of interest not above six per cent. per annum, payable annually or semi-annually.

The Troy and Greenfield Railroad Company, between August 1855 and July 1861, at different times, issued bonds payable thirty years from date, in the aggregate amount of six hundred thousand dollars and largely in excess of the capital stock paid in, and made a mortgage to secure them. The bonds were issued in good faith and were held by persons who had them bona fide.

Hoar, Judge, giving the opinion of the Court, says: "The bonds issued by the Troy and Greenfield Railroad Company, for securing which the mortgages held by the trustees was made, are payable at a PERIOD EXCEEDING TWENTY YEARS FROM THEIR DATE, and were issued to an amount very largely in excess of the capital stock actually paid in. The Legislature did not mean that such bonds should be made. Their illegality is apparent upon their face and open equally to the knowledge of the party who issued and the party who received them." And he further declares, referring to the illegal and irregular issue of the bonds—"Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally." The essential departure from the requirements of the statute in the form of these bonds, was in the time of their maturing, and this was apparent upon an inspection of the act and a knowledge of the illegality is held to follow their transfer even to bona fide holders. The disregard of the statutory limitation upon the amount to be issued could only be ascertained by enquiring into matters outside of the bonds themselves and of the statute authorizing their issue. Whatever doubt may exist as to the effect of an issue in excess of the prescribed limits upon the validity of securities transferred to innocent holders who have taken without notice of the over-issue, there can be none as to the illegality in the extension of the time fixed for their maturity, patent upon the face of the bonds, and of which every person must take notice.

This doctrine is established in numerous cases, and beyond the necessities of the present argument, a few of which cases only are cited. "Persons dealing with the managers of a corporation," says Campbell, Judge, "must take notice of the limitations upon their authority by the act of incorporation.—(Pearce vs. Mad. and Ind. R. Road Co., 21 How. 443.) Again says the same Judge: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation and that persons dealing with a company must take notice of whatever is contained in the law of their organization. (Zabriskie vs. Cleveland Co. and Cin. R. Co. 23d How. 398.) And to the same effect: Mercer Co. vs. Hacket 1 Wall 83. Richardson vs. Sibley 11 Allen 72. Pearce vs. Emery 32 N. H. R. 504. Comm'rs of Knox vs. Aspinwall 21 How. 545. These consequences follow whether an act chartering a railroad Company be regarded as a private or public act, of which every person is presumed to have knowledge. But these have been declared to be public statutes. (Richardson vs. Sibley, supra. East Ang. R. Co. vs. East Co. R. Co. 73 En. C. L. R. 810.

The plaintiff, however, had not constructive but positive notice of the infirmity attaching to his bonds. The very section of the Act under which the bonds were issued (Act of Dec. 20, 1866,)

was printed in full upon the back of each one of them, and thus clothed they came into his possession. This section is in these words: "That to enable such Company to raise the money necessary to construct and extend said road to some point on the North Carolina Railroad, to connect with said road at such point as may be selected by the Western Railroad Company, or by the President and Directors of the same, that said President and Directors are hereby authorized and empowered to issue the mortgage bonds of said Company in sums of not less than one hundred dollars each, and not exceeding in amount nine hundred thousand dollars, and to be negotiated at not less than par, and NOT TO MATURE AT AN EARLIER PERIOD THAN THIRTY YEARS, in sums of not less than one hundred dollars, payable at such time and place and at such rate of interest, not to exceed eight per cent. as may be authorized by said Company, and to secure the payment thereof, may make a mortgage upon the Railroad and any and all of its property or income, in such manner and form as they may determine."—(Pamphlet Laws 25) The restraint upon the sale of the bonds below their par value was removed by section 3 of the amendatory act of March 14, 1868.—Ibid 30. A further modification was made by the Act of January 10, 1871, the first section of which removes the limit upon the amount of the bonds, and declares that the company "may issue such an amount of bonds and upon such terms and conditions AS THEY ARE NOW, or may hereafter BE PERMITTED AND AUTHORIZED BY THE STOCKHOLDERS OF SAID COMPANY.—Pamphlet Laws 38

These amendments do not undertake to interfere with the restraint as to the time within which the bonds MUST NOT MATURE, and if they did assume to do so no action of the Stockholders has been taken under its requirements, to give vitality and effect to the general words used in the concluding clause of the section quoted, nor is any such allegation contained in the plaintiff's bill. The plaintiff avers that the resolution of the stockholders, authorizing the loan and mortgage, was passed on the 7th day of April, 1870.—Report of Evidence 3. The resolution itself is set out in full in Exhibit A, filed with the bill.—Ibid 17. The resolution conforms substantially to the provisions of the several enactments in force when it was adopted, omitting the limitation as to amount, and gives the authority for the issue of bonds and the making the mortgage to secure them. It thus becomes necessary to ascertain if the bonds and mortgage are of the kind and in the form permitted by the statutes, and the resolution referred to. It appears from the report of the commissioner, at page 5 section 9, what is the form of the bonds and what are the provisions of the mortgage relating to them, their variation from the act, and the consequences of such variation upon their validity.

In the bonds is found this clause: "In case of the non-payment of any coupon in full upon presentation and demand of payment thereof when due at the said bank, and default of payment thereof shall continue for six months after such presentation and demand, then the principal of this bond shall become due and payable as provided in the deed of trust or mortgage made to secure the payment thereof, as though the whole period of thirty years had elapsed." In the mortgage is a similar clause whereby in case of non-payment of interest for six months, the maturity of the bond is accelerated in the same manner.

The bonds then are not drawn in such form as the statute prescribes and so that they shall not "MATURE AT AN EARLIER PERIOD than thirty years," but may become due and demandable within less than one year in case of default in payment of the interest represented in a single coupon. Then may follow a sale of the property conveyed and the entire destruction of the Company. Such a result was never contemplated by the General Assembly which made these enactments, and interposed the restrictions which they contain, nor is it within the purview of their provisions.

This is not an immaterial departure from the requirements of the law and of the resolution giving it effect; as it might, and it is construed, it now does precipitate the payment of a large debt and lead to the sale of the entire corporate property—thus depriving the corporation of the very advantages which an extended credit was intended to secure, and of the resources from whose

future development in the operations of the road the means were expected to be obtained to discharge the principal obligations, and thereby putting an end to its corporate existence. It is no sufficient answer to say the result may be averted by punctuality in the payment of accruing interest. The failure to pay interest is a breach of that part of the contract, but the obligation to pay the principal under the requirements of the Act, is not and cannot be broken until the expiration of the term of credit prescribed, nor can consequences of such breach be earlier precipitated upon the Company.

There is also a defect in the mortgage itself affecting its validity. It is drawn in disregard of an important feature of the enabling Act, in attempting to convey, and subject to a speedy sale, the FRANCHISE of the Company as well as its property. Thus by a sale, hastened by default in the payment of an inconsiderable sum, the purchaser becomes not only the owner of the corporate property but of the immunities and franchise of the corporation itself, and becomes its successor and representative—a result entirely beyond the power intended to be conferred.

The cases (such as Grandchute vs. Winegar, 15 Wall 355, and others cited in the opinion of the Court in that case, and many decided since) which apparently militate against the doctrine that illegality and want of power in a corporation to do an act, as in the present case, to make the bonds and mortgage follow the transfer of the bonds, and render them invalid in the hands of an assignee, are, when properly considered, not in conflict.

The principle there decided is, that matter in pais to be performed and decided by proper officers as a precedent to the issue, will be deemed to have been done, and no evidence will be heard to the contrary to the prejudice of assignees who had no actual notice of the omission of such officers nor constructive notice furnished by the statute itself which authorized the issue. But when not a general power, subject to certain conditions to be performed, before it is exercised, is given, but a LIMITED POWER IS CONFERRED, and the validity of the act done depends upon its being within the scope of such LIMITED POWER and authorized by its terms, the want of power necessarily renders what is done inoperative and void, and a bond thus issued is equally so in the hands of an assignee.

In addition to the cases before referred to the following are also cited in support of the principle enunciated: Bissell vs. Mi. So. and N. In. Railroad. 22 N. Y. Court of Appeals, Rep. 258. White vs. Franklin Bank, 22 Pick 181.

W. K. A. Smith

For Appellee, Deft.

IN THE

Supreme Court of the United States.

No. 205.—October Term, 1876.

Henry Howell et al., *Appellants*,
vs.
Rufus Y. McAden et al.

BRIEF OF A. S. MERRIMON,

Of Counsel for Appellants.

The Western Railroad Company, desiring to extend their road, resolved to issue $900,000 in bonds, secured by deed in trust.—(See Exhibit A to complaint; Exhibit B, p. 30 of transcript; Resolution of April 8, 1870, p. 157.)

Three trustees were named in the trust deed to hold the title of the trust property conveyed for the security of the bondholders.

When they executed the trust deed and accepted the trust, five of the bonds were paid to each of the trustees, among them Rogers, a New York banker, having no connection prior to that date with the company, as compensation for serving as such.

The bonds, other than those delivered to the trustees as compensation, were not delivered to them, nor did they as

trustees ever have possession or title to any of such other bonds.

A bid for the construction of the railroad extension was made by Hunt & Co., in July, 1870.—(See p. 75.) This was accepted October 13, 1870.—(pp. 153 and 163.) The contract was closed October 11, 1870.—(p. 71.) The bonds to be issued under the said resolution were the basis of said bid.—(See p. 75; see arts. 10, 11, and 12 of contract between the company and Hunt & Co., p. 74.) And by article 12 of contract (p. 74) the company agrees to place the bonds for the payment of Hunt & Co. in the hands of an agent of the company, to be held subject to the joint order of the company and the contractors. The contract is dated 11th October, 1870. The bonds and the deed in trust are dated 31st October, 1870.

October 14, 1870, (p. 74,) the committee on contract instructed the president to advance bonds to the contractors.

December 5, 1870, J. A Hunt & Co. assigned and transferred their contract, with the consent of the chief engineer thereto signified in writing, (see p. 76,) to Thomas S. Lutterloh.

P. 74. Later, January 4, 1870, said engineer signified his assent by an endorsement of the original contract, which was not required, the former assent being ample under article 7 of the contract.—(p. 72.)

If there were any defects in these proceedings they were cured by the ratification and further agreement with T. S. Lutterloh, January 5, 1871.

Lutterloh sought to carry out his contract in good faith and was prevented by the company.—(See pp. 164, 165.)

On March 16, 1871, Lutterloh surrendered his contract. —(p. 170.)

Whatever may have been the nature and character of these proceedings, they in no wise affect a purchaser for value of the bonds paid to Rogers, without notice of any fraud.

Rogers received his bonds at the date of the acceptance of the trust as compensation.—(p. 99.)

P. 42. Article 9 of the trust deed provides *that the trustees shall be entitled to just compensation for all services, &c., &c., to be paid by the said company or out of the property.*

Pp. 35 and 36. By articles 2 and 3, in case of a sale, the trustees could appropriate part of the proceeds to pay themselves.

By article 8, if the bonds are paid, &c., then the trust deed becomes void.

So that, in case there was no sale, the company would have had to pay the trustees just compensation out of its assets.

It was neither fraudulent, illegal, nor against conscience for the trustees, upon entering upon the discharge of great and important duties at the instance of a corporation with which they had no connection, to demand and receive as compensation at that moment five of the mortgage bonds of the company, which the company and the contractors rated at about 60 cents on the dollar.—(See p. 75.)

But even if there were any defect in the title of Rogers, Howell, the plaintiff, is not affected with notice.—(See his testimony, p. 150 et seq.) He bought the bonds at 75 cents, on December 23, 1870.

That he had confidence in Mr. Rogers, and that Mr. Rogers was his banker, if so, might account for his not making particular enquiries into these bonds (which he was not bound to do); and it seems that the Western Railroad Company also had confidence in Mr. Rogers, and that he was named as a trustee to give the public confidence in the bonds and mortgage and security, so that the bonds could be marketed to advantage.

Plaintiff bought these five bonds December 23, 1870. In the winter of 1872–'73, 425 other bonds of like character are deposited with him, in which he has no interest, to be held subject to certain litigation in reference thereto. That transaction could not have affected him with notice if there was any fraud in it.

If there was anything irregular in the handling of these $425,000 of bonds, or other bonds, by the officers of the company, the trustees in the deed are not necessarily affected with notice. Their duties were not with the *bonds*, but with the trust property. If Rogers knew of any fraud, such knowledge on his part was not notice to a purchaser for full value in December, 1870. He was not the agent of the bond-owners in any such light, or for any such purpose, as would make his notice, notice to them.

As to the fourth exception, sustained by the circuit court, there is absolutely no evidence tending to show notice on the part of Rogers of anything fraudulent in the mortgage or bonds, at the time of its execution, which was the date of his receiving the bonds as compensation.

As to the fifth exception. There is no evidence tending to show notice on the part of Howell that the bonds sued on were taken after notice of any fraud in the making of the mortgage or bonds.

He stands as a purchaser for full value, without notice of any fraud in the issue.

There is no fraud admitted or proved in the issue; but had there been, Howell is not shown to have taken with notice.

He had only to look at the law—the power of the company—the execution.

The execution is not denied.

As to the power of the company: Its authority to issue is full; the restriction as to price had been removed; and the act of January 10, 1871, removes all restrictions as to the issue of bonds.

There is no general policy of the State of North Carolina, ascertained from its statutes, as to the period when bonds issued by corporations may or may not mature. See Battle's Revisal of N. C. Statutes, ch. 99, p. 940, section

29, subd. 10, title, "Railroads," allowing the issue of bonds without restriction to railroad companies, and by section 45 of said chapter, extending the powers therein specified to all existing railroad corporations.

The act of January 10, 1871, was a waiver.

Atty. Genl v. Pet. & Roanoke R. R. Co., 6 Ire., 466.
The City vs. Lamson, 9 Wallace, 485.
Beloit vs. Morgan, 7 Wallace, 624.

As to effect of waiver.

White Water Valley Canal Co. vs. Vallette Co., 21 Howard, 425, 426.

The bonds issued and sued on do not mature before the expiration of twenty years, and are within the terms of the act of assembly.

On the non-payment of interest it is made the duty of the trustees to enter and sell. It could never have been contemplated that the mortgage was to secure the payment of the coupons only when the principal of the bond should fall due.

Such a contract would have been unusual.

Jessup et al. vs. City Bk. of Racine, 14 Wisconsin, p. 338.

A stipulation in bond and mortgage that "if default is made in payment of interest, the principal of the bond shall thereby become immediately due," if unwarranted by the charter, does not operate to avoid the bond; but the stipulation only is rejected, leaving the obligation of the bond to pay at lawful maturity, as if the stipulation had not been inserted.

The company was not prohibited from contracting to pay interest when it annually became due. On such a contract, ordinarily evidenced by a *coupon*, suit could be brought on default, judgment obtained, and the money made out of the assets.

Certainly this is not against the letter of the statute.

A provision in the mortgage, that on such default the trustees may enter and sell, is substantially the same as above.

When the trustee makes such sale why may they not go forward and pay the entire debt, instead of making repeated sales from time to time of the property and crippling the operations of the insolvent corporation?

The contract is not to pay within 20 years. The maturity is, therefore, not within 20 years, and the charter is not violated.

But at all events the contract may be binding on the company, though an abuse of its power, for which it is amenable to the government creating it.

Southern Life Ins. Co. vs. Willy, 5 Fla., p. 110.
Bank vs. Hammond, 1 Rich, (S. C.,) 281.

There is no general policy of the State of North Carolina as to the period when bonds issued by corporations shall mature.

Railroad companies may issue bonds without restrictions.

See Bat. Revisal N. C. Statutes, ch. 99, p. 740, sec. 29, sub. 10, which provision applies to all railroad companies, by sec. 45 of same chapter.

The act of January 10, 1871, was a waiver on the part of the state.

Atto. Gl. vs. Pet. & Roanoke R. R. Co., 6 Ire., (McLard,) 456.
City vs. Lamson, 9 Wallace, 485.
Beloit vs. Morgan, 7 Wallace, 624.

As to effect of the waiver.

White Water Valley Canal Co. vs. Vallette, 21 Howard, 425–426.

Again: The agreement that the principal shall become due is a covenant.

37 Barbour, 60.
28 Barbour, 29.
7 Paige, 179.
10 Abb Practice, 128.
4 Taunton, 227.
5 B. & A., 40.
3 Burrows, 1370.

The contract may be void in part and good in part.

Grand Gulf Bank vs. Archer, 26 Miss., (8 Snowden & M.,) 151.

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